EDITOR'S NOTE

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(13)

o. 84-902-ASX
tatus: GRANTED

Title: Wardair Canada, Inc., Appellant
v.
Florida Department of Revenue

ocketed:
ecember 5, 1984

Court: Supreme Court of Florida

Counsel for appellant: Hansen, Walter D.

Counsel for appellee: Mellichamp III, Joseph C.

ee also:
84-922
84-929
84-926
84-921
84-1041

| ntry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Dec 5 1984 | G | Statement as to jurisdiction filed. |
| 2 | Dec 5 1984 | | Appendix of appellant Wardair Canada, Inc. filed. |
| 4 | Dec 21 1984 | | Order extending time to file response to jurisdictional statement until February 4, 1985. |
| 5 | Feb 4 1985 | | Motion of appellee FL Dept. of Revenue to dismiss or affirm filed. |
| 6 | Feb 6 1985 | | DISTRIBUTED. February 22, 1985 |
| 7 | Feb 6 1985 | | REDISTRIBUTED. February 22, 1985 |
| 8 | Feb 20 1985 | | REDISTRIBUTED. March 15, 1985 |
| 9 | Mar 18 1985 | P | The Solicitor General is invited to file a brief in this case expressing the views of the United States. Justice Powell OUT. |
| 10 | Aug 6 1985 | | Application of the Solicitor General for leave to file an amicus curiae brief in excess of the page limitation |
| 11 | Aug 6 1985 | | filed (A-110), and order granting same by Powell, J., on Aug. 8, 1985. The brief may not exceed 35 pages. |
| 12 | Sep 17 1985 | | Brief amicus curiae of United States filed. VIDED. |
| 13 | Sep 18 1985 | | REDISTRIBUTED. October 11, 1985 |
| 14 | Sep 18 1985 | | REDISTRIBUTED. October 11, 1985 |
| 15 | Oct 2 1985 | X | Brief of appellee in reply to amicus curiae filed. VIDED. |
| 17 | Oct 15 1985 | | REDISTRIBUTED. October 18, 1985 |
| 18 | Oct 15 1985 | | REDISTRIBUTED. October 18, 1985 |
| 20 | Oct 21 1985 | | REDISTRIBUTED. November 1, 1985 |
| 21 | Oct 21 1985 | | REDISTRIBUTED. November 1, 1985 |
| 22 | Nov 4 1985 | | PROBABLE JURISDICTION NOTED. |
| | | | *********************************************************** |
| 23 | Nov 20 1985 | G | Motion of appellant to dispense with printing the joint appendix filed. |
| 24 | Dec 2 1985 | | Motion of appellant to dispense with printing the joint appendix GRANTED. |
| 26 | Dec 12 1985 | | Order extending time to file brief of appellant on the merits until December 24, 1985. |
| 27 | Dec 19 1985 | | Brief amicus curiae of Aer Lingus, et al. filed. |
| 28 | Dec 19 1985 | | Brief amicus curiae of Air Jamaica Limited, et al. filed. |
| 29 | Dec 24 1985 | | Brief of appellant Wardair Canada, Inc. filed. |
| 30 | Dec 26 1985 | | Brief amicus curiae of United States filed. |
| 32 | Jan 7 1986 | G | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |

o. 84-902-ASX

| ntry | Date | Note | Proceedings and Orders |
| --- | --- | --- | --- |
| 33 | Jan 8 1986 | D | Motion of Aer Lingus, et al. for leave tc participate in oral argument as amici curiae, for divided argument and for additional time for oral argument filed. |
| 34 | Jan 21 1986 | | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. |
| 35 | Jan 21 1986 | | Motion of Aer Lingus, et al. for leave to participate in oral argument as amici curiae, for divided argument and for additional time for oral argument DENIED. |
| 37 | Jan 22 1986 | | Order extending time to file brief of appellee on the merits until February 6, 1986. |
| 38 | Feb 4 1986 | | SET FOR ARGUMENT, Monday, March 31, 1986. (2nd case) |
| 39 | Feb 5 1986 | | Brief of appellee FL Dept. of Revenue filed. |
| 40 | Feb 6 1986 | G | Motion of National Governors' Association, et al. for leave to file a brief as amici curiae filed. |
| 41 | Feb 24 1986 | | Motion of National Governors' Association, et al. for leave to file a brief as amici curiae GRANTED. |
| 42 | Feb 21 1986 | | CIRCULATED. |
| 43 | Mar 20 1986 | X | Reply brief of appellant Wardair Canada, Inc. filed. |
| 44 | Mar 31 1986 | | ARGUED. |

84-902 (2)



No.

IN THE

# Supreme Court of the United States

October Term, 1984

WARDAIR CANADA INC.,

*Appellant,*

v.

STATE OF FLORIDA,
DEPARTMENT OF REVENUE,

*Appellee.*

ON APPEAL FROM THE
SUPREME COURT OF FLORIDA

## JURISDICTIONAL STATEMENT

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Washington, D.C. 20009
(202) 745-0441
*Attorney for Appellant*

35 pp

## QUESTION PRESENTED

This case presents only a minor factual variation of the question decided in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), but with an adverse repercussion potential at least as serious if the Florida Supreme Court decision being appealed is not reversed. The question presented by this appeal is:

Whether the imposition by Florida of an unapportioned fuel tax on an instrument of foreign commerce, aviation fuel, pumped from Florida based storage facilities into the aircraft of a foreign national for use as a propellant of such aircraft which are owned, based and registered abroad, and operated exclusively in international commerce is in violation of:

1. the Commerce Clause of the Constitution of the United States, Article I, Section 8, Clause 3,

2. the Supremacy Clause of the Constitution of the United States, Article VI, Clause 2, and

3. the Nonscheduled Air Services Agreement between the Government of the United States of America and the Government of Canada, TIAS 7826, 25 UST 787 (May 8, 1974).

## PARTIES

The parties are those named in the caption.*

Pursuant to Supreme Court Rule 28.1, Appellant sets forth its parent company, and subsidiary (except its wholly owned subsidiary) and affiliate corporations, as follows: Wardair International Ltd. (the parent company), International Vacations Ltd., Wardair Leasing Inc., Wardair Equipment Ltd., Wardair Hawaii Limited, Wardair (U.K.) Ltd., Wardair Holidays (Deutschland) GmbH, and Wardair (France) S.A.R.L.

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*There are many domestic and foreign air carriers that challenged the imposition of the state tax on aviation fuel used in interstate or foreign commerce on Constitutional and other grounds in other cases. The Florida Second Circuit Court in and for Leon County, Florida, had consolidated with Appellant's case, a complaint filed by Air Jamaica, a Jamaican air carrier, and 11 other foreign airlines, but the Florida Second Circuit Court issued its final judgment and opinion as to Appellant's action separate from the others. The separate Florida Second Circuit Court judgments and opinions involving Appellant, and the others were appealed separately. The Florida Supreme Court upheld the validity of Senate Bill 8A, Chapter 83-3, Laws of Florida, except as to the corporate tax credits to Florida based airlines in all of the cases certified to the Florida Supreme Court by the Florida First District Court of Appeal. Besides the opinions cited in footnote 1, *infra*, the other Florida Supreme Court opinions that ruled on the validity of the fuel tax imposed by Florida Senate Bill 8A on aviation fuel pumped from Florida storage facilities for use by U.S. and foreign air carriers in air commerce are as follows: *Eastern Air Lines, Inc.* v. *Department of Revenue*, So.2d (Fla. 1984); *Department of Revenue* v. *Lineas Aereas Costarricenses, S.A. et al.*, So.2d (Fla. 1984); *Department of Revenue* v. *Air Jamaica, Ltd., et al.*, So.2d (Fla. 1984); and *Northeastern International Airways, Inc., et al.* v. *Department of Revenue*, So.2d (Fla. 1984).



## TABLE OF CONTENTS

**Table of Contents**
**APPENDIX**





**TABLE OF AUTHORITIES**

**Table of Authorities continued**





**Table of Authorities continued**

No.

IN THE

**Supreme Court of the United States**

October Term, 1984

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WARDAIR CANADA, INC.

*Appellant,*

v.

STATE OF FLORIDA,
DEPARTMENT OF REVENUE,

*Appellee.*

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**On Appeal from the Supreme Court of Florida**

**JURISDICTIONAL STATEMENT**

## OPINIONS BELOW

The opinion of the Florida Supreme Court is not yet reported, but is printed in Appendix A, p.A-1.[1] The final judgment and opinion of the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, the

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[1] The Supreme Court decision cites two Florida court decisions both involving the Florida fuel tax at issue in this case. One is an opinion of the Florida Supreme Court, *Delta Airlines, Inc., et al.* v. *Department of Revenue*, not yet reported, and the final judgment and opinion of the Second Circuit Court in and for Leon County, Florida, *Lineas Aereas Costarricenses, S.A. et al.* v. *State of Florida, Department of Revenue*, not yet reported. Both cases are printed in Appendix B, p. A-8, and Appendix D, p. A-25, respectively.

Florida Court in which Appellant filed its complaint that instituted this proceeding, is not reported, but is printed in Appendix C, p. A-21.

## JURISDICTION

This suit originally commenced through an action by Appellant against Appellee seeking a permanent injunction against Appellee from the assessment and collection of fuel taxes pursuant to Senate Bill 8A, Chapter 83-3, Laws of Florida (hereinafter referred to as "Florida Senate Bill 8A"), on aviation fuel pumped from Florida based storage facilities to be used exclusively as a fuel to perform foreign air transportation services in foreign commerce by a foreign national, Appellant. The basis of Appellant's suit was that the imposition of such a fuel tax violates the Constitution of the United States and the Nonscheduled Air Services Bilateral Agreement between Canada and the United States entered into on May 8, 1974, TIAS 7826, 25 UST 787, an international bilateral agreement entered into by the Federal Government with Canada pursuant to the powers granted to the Federal Government by the Constitution of the United States.

The opinion and judgment of the Florida Supreme Court was rendered June 14, 1984, holding that Florida Senate Bill 8A as it pertained to Appellant did not violate the Constitution of the United States and that Appellant is not entitled to an exemption from the Florida fuel tax. Appellant's motion for a rehearing was filed timely on June 28, 1984, and was denied by the Florida Supreme Court on September 12, 1984. Appendix E, p. A-37. The Notice of Appeal was served November 13, 1984, and filed in the Florida Supreme Court on November 15, 1984. Appendix F, p. A-39. The time within which to docket this appeal in this Court expires with December 11, 1984. The



jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(2). Decisions sustaining jurisdiction of this Court to review the decision on direct appeal are: *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 440–441, (1979); *Cohen* v. *California*, 403 U.S. 15, 17–18 (1971); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 61, n.3 (1963); and *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921).

If this Court does not consider this appeal to be the proper mode of review, Appellant respectfully requests that this appeal be acted upon as a petition for a writ of *certiorari* pursuant to 28 U.S.C. sec. 2103.

## CONSTITUTIONAL, STATUTORY, AND INTERNATIONAL AIR TRANSPORT AGREEMENT PROVISIONS INVOLVED

This case raises questions concerning the validity of certain provisions of Senate Bill 8A, Chapter 83-3, Laws of Florida, under the Commerce and Supremacy Clauses of the United States Constitution, Article I, Section 8, Cl. 3 and Article VI, Cl. 2, respectively, and the Nonscheduled Air Services Agreement between the United States and Canada of May 8, 1974, TIAS 7826, 25 UST 787.

The applicable provisions of The Constitution of the United States of America are:

> "Congress shall have Power . . . To regulate Commerce with foreign Nations. . . ." U.S. Const. Art. I, sec. 8, cl. 3.
>
> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme

Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2.

Relevant provisions of Florida Senate Bill 8A, are presented in Appendix G, p. A-42.

Relevant provisions of the Nonscheduled Air Services Agreement between the United States and Canada are printed in Appendix H, p. A-48.

Convention on International Civil Aviation (The Chicago Convention), 61 Stat. 1180, TIAS 1591 (signed Dec. 7, 1944, ratified by U.S. Aug. 9, 1946, effective April 4, 1947), Article 24(a):

"Aircraft on a flight to, from, or across the territory of another contracting State shall be admitted temporarily free of duty, subject to the customs regulations of the State. Fuel, lubricating oils, spare parts, regular equipment and aircraft stores on board an aircraft of a contracting State, on arrival in the territory of another contracting State and retained on board on leaving the territory of that State shall be exempt from customs duty, inspection fees or similar national or local duties and charges. . . ."

Relevant sections of the Federal Aeronautics Act of 1958, as amended, 49 U.S.C. sec. 1301, *et seq.* are as follows:

Section 402, 49 U.S.C. sec. 1372:

"(a) No foreign air carrier shall engage in foreign air transportation unless there is in force a permit issued by the Board authorizing such carrier so to engage.

* * *

"(e) The Board may prescribe the duration of any permit and may attach to such permit such reasonable terms, conditions, or limitations as, in its judgment the public interest may require."



Section 801, 49 U.S.C. sec. 1461:

"(a) The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in . . . any permit issuable to any foreign air carrier under section 402 of this Act, shall be presented to the President for review. The President shall have the right to disapprove any such Board action concerning such . . . permits solely upon the basis of foreign relations or national defense considerations which are within the President's jurisdiction. . . ."

Section 802, 49 U.S.C. sec. 1462:

"The Secretary of State shall advise the Secretary of Transportation, the Board, and the Secretary of Commerce, and consult with the Secretary of Transportation, Board, or Secretary of Commerce, as appropriate, concerning the negotiations of any agreement with foreign governments for the establishment or development of air navigation, including air routes and services."

Section 1102, 49 U.S.C. sec. 1502:

"(a) In exercising and performing their powers and duties under this chapter, the Board and the Secretary of Transportation shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries. . . .

"(b) In formulating United States international air transportation policy, the Congress intends that the Secretary of State, the Secretary of Transportation, and the Civil Aeronautics Board shall develop a negotiating policy which emphasizes the greatest degree of competition that is compatible with a well-functioning international air transportation system. This includes, among other things:

(1) the strengthening of the competitive position of United States air carriers to at least assure equality with foreign air carriers, including the attainment of opportunities for United States air carriers to maintain and increase their profitability, in foreign air transportation;

(2) freedom of air carriers and foreign air carriers to offer fares and rates which correspond with consumer demand;

(3) the fewest possible restrictions on charter air transportation;

(4) the maximum degree of multiple and permissive international authority for United States air carriers so that they will be able to respond quickly to shifts in market demand;

(5) the elimination of operational and marketing restrictions to the greatest extent possible;

(6) the integration of domestic and international air transportation;

(7) an increase in the number of nonstop United States gateway cities;

(8) opportunities for carriers of foreign countries to increase their access to United States points if exchanged for benefits of similar magnitude for United States carriers or the traveling public with permanent linkage between rights granted and rights given away;

(9) the elimination of discrimination and unfair competitive practices faced by United States airlines in foreign air transportation, including excessive landing and user fees, unreasonable ground handling requirements, undue restrictions on operations, prohibitions against change of gauge, and similar restrictive practices; and

(10) the promotion, encouragement, and development of civil aeronautics and a viable, privately owned United States air transport industry.



"(c) To assist in developing and implementing such an international aviation negotiating policy, the Secretaries of State and Transportation and the Civil Aeronautics Board shall consult, to the maximum extent practicable, with the Secretary of Commerce, the Secretary of Defense, airport operators, scheduled air carriers, charter air carriers, airline labor, consumer interest groups, travel agents and tour organizers, and other groups, institutions, and government agencies affected by international aviation policy concerning both broad policy goals and individual negotiations.

"(d) The President shall grant to at least one representative of each House of Congress the privilege to attend international aviation negotiations as an observer if such privilege is requested in advance in writing."

## STATEMENT OF THE CASE

*Statement of Facts*

Appellant,[2] is a corporation established and existing under the laws of Canada with its principal offices and base of operation located in Canada. It is engaged in international charter air transportation services as a common carrier of passengers and property. Its international services originate largely out of Canada to destinations in Europe, the Carribbean, Mexico and the United States.

In order to perform charter services to and from the United States, Appellant applied to the Civil Aeronautics

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[2] In the preceedings below, Appellant was identified under its prior name, Wardair Canada (1975), Ltd. Subsequent to Appellant's initial action below, it changed its corporate name to its present one, Wardair Canada Inc., and that corporate name change was approved by the Civil Aeronautics Board, CAB Order 83-12-54 (Dec. 9, 1983).

Board for a foreign air carrier permit pursuant to section 402 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1372, which the CAB granted.[3] Under its CAB issued permit (Appendix I, p. A-73), Appellant's charter foreign air transportation service is limited to that authorized by the U.S./Canada Nonscheduled Air Services Agreement of May 8, 1974, TIAS 7826, 25 UST 787. Appendix H, p. A-48. The term of its permit also depends on the continuation of that international bilateral agreement or another subsequent international agreement between the U.S. and Canada covering the same type of air service. Appendix I, p. A-78. Pursuant to its foreign air carrier permit authority, Appellant operates round-trip charter[4] programs between Canada and the United States with many of those operations in and out of points in Florida.

The Florida legislature on or about March 3, 1983, enacted Florida Senate Bill 8A. Appendix G, p. A-42. It was signed into law by the Florida governor effective April 1, 1983. Florida Senate Bill 8A imposes a 5 percent fuel tax, denominated by the Florida Department of Revenue as an excise tax, on all aviation fuel drawn from Florida storage facilities based on a calculated, not an

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[3] CAB Order 80-8-97 (July 18, 1980), and the foreign air carrier permit issued to Appellant pursuant to that Board order are printed in Appendix I, p. A-68.

[4] While the U.S./Canada bilateral agreement is identified as the Nonscheduled Air Services Agreement between the United States and Canada, Annex B to that agreement defines nonscheduled air service as charter air service permitted under the terms of the agreement. Appendix H, p. A-64.



actual price per gallon.[5] All aviation fuel purchased in Florida by airlines is fully taxed regardless of whether it is used in intrastate, interstate, or in foreign commerce. There is no apportioning.[6] All aviation fuel purchased by Appellant from Florida storage facilities is used exclusively in foreign commerce as an energy source to propel its aircraft used in its foreign charter air transport operations pursuant to the foreign air carrier permit issued to Appellant by the Civil Aeronautics Board.

Concern as to a possible aviation fuel tax to be imposed by Florida on foreign nationals operating services in foreign air commerce was expressed by the United States Department of State in a letter to the Florida Department of Revenue, dated September 29, 1982. Appendix J, p. A-82. The U.S. State Department advised the Florida Department of Revenue of the "generally-accepted and long-standing international practice of recriprocally exempting [aviation fuel] from taxes". It stated that "The United States obligation to accord these exemptions stems from our adherence to Article 24 of the International Convention on Civil Aviation (Chicago, 1944) and to the air transport agreements which the United States has

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[5] Revenues generated by the imposition of this Florida fuel tax are to be utilized by Florida's Department of Transportation for the purposes set forth in Florida Statute 339.08. Under that provision such tax revenues are to be utilized in areas wholly unrelated to air transportation, such as the contruction and maintenance of state roads.

[6] The failure to provide for reasonable apportioning of the tax, and to be fairly related to the services provided foreign airlines like Appellant makes this tax unconstitutional based on the tests in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977).

with over 70 foreign countries." The State Department concluded that: "A proliferation of state and local taxes would frustrate the international system of reciprocal tax exemptions". The Florida Department of Revenue responded stating that "Florida recognized the importance of foreign airlines . . . many years ago, and . . . the generous tax advantages allowed them have not changed." Appendix K, p. A-85. After Florida Senate Bill 8A was enacted, the U.S. State Department wrote another letter (Appendix L, p. A-87) to the Florida Department of Revenue expressing "concern regarding the recent enactment of a state tax on aviation fuel", and observing that:

> "If imposed, this tax will cause serious foreign relations problems unless provision is made to exclude foreign airlines."

Shortly after Florida Senate Bill 8A became law, Appellant filed its complaint in court challenging the constitutionality of the law insofar as it authorizes the assessment and collection of fuel taxes from Appellant.

**The Proceedings Below**

This case originated through a complaint, as amended, by Appellant filed in the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida (hereinafter referred to as the "Florida Second Circuit Court"), challenging the constitutionality of Florida Senate Bill 8A insofar as it imposed and required a collection of a fuel tax on aviation fuel pumped into Appellant's aircraft to be used solely as a propellant of such aircraft which are used exclusively in international air commerce. The grounds for Appellant's challenge of the Florida legislation was that it violates the Commerce and Supremacy clauses of



the United States Constitution, and the Nonscheduled Air Services Agreement between the United States and Canada, TIAS 7826, 25 UST 787 (May 8, 1974).[7]

The Florida Second Circuit Court held that the challenged Florida legislation did not violate the United States Constitution, but that it is inconsistent with the U.S./Canada Nonscheduled Air Services Agreement, and on that basis granted Appellant a permanent injunction from the assessment and collection of fuel taxes by Appellee. *Wardair Canada (1975), Ltd.* v. *State of Florida, Department of Revenue,* Fla. Supp. (Fla. 2d Cir. 1983). Appendix C, p. A-21.

Appellee appealed the final judgment of the Florida Second Circuit Court to Florida's First District Court of Appeal, and Appellant filed a cross-appeal again squarely challenging the constitutionality of the Florida legislation. The First District Court certified the case to the Florida Supreme Court. All during the proceeding before the Florida Supreme Court, Appellant took the position that the Florida legislation insofar as it required Appellant to pay a fuel tax is unconstitutional, violating the Commerce and Supremacy Clauses, and that it is inconsistent with the U.S./Canada Nonscheduled Air Services Agreement. On June 14, 1984, the Florida Supreme Court filed its decision on these issues (rehearing denied on September 12, 1984) affirming that part of the decision of the Florida Second Circuit Court holding that Florida

[7] Appellant and Appellee stipulated that, pending a final decision of this case, Appellant is permitted to self accrue the fuel tax imposed by Florida Senate Bill 8A. The funds so accrued are maintained in a segregated escrow account. As of now Appellant's escrow account created by it pursuant to said stipulation contains over $117,000.00.

Senate Bill 8A is constitutional,[8] but reversed the lower court's holding that the U.S./Canada Nonscheduled Air Services Agreement exempts Appellant from the payment of fuel taxes pursuant to Florida Senate Bill 8A. *Department of Revenue* v. *Wardair Canada, Ltd.*, So. 2d (Fla. S. Ct. 1984). Appendix A, p. A-1.

**THE QUESTION PRESENTED IS SUBSTANTIAL**

**The Supreme Court of Florida has decided a Federal Constitutional question of substance in a way not in accord with applicable decisions of this Court, the U.S. Constitution and Federal Government policy involving foreign air commerce.**

The Supreme Court of Florida missed the very essence of the cases on which it heavily relied: *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), and *Hines* v. *Davidowitz*, 312 U.S. 52 (1941). The position taken by the Florida Supreme Court in its decision is virtually identical to the position taken by the Appellees in *Japan Line* v. *County of Los Angeles*. This Court summarized that position and then repudiated it in *Japan Line* as follows:

> "The premise of appellees' argument is that a State is free to impose demonstrable burdens on commerce, so long as Congress has not preempted the field by affirmative regulation. But it long has been 'accepted constitutional doctrine that the commerce clause,

[8] The Florida Supreme Court decision concluded that section 6 of Florida Senate Bill 8A violated the Commerce Clause of the U.S. Constitution by providing a corporate tax credit to Florida-based airlines, but that violation according to the Florida Supreme Court decision is severable from the remaining provisions of the bill without hampering the legislation's primary purpose. This aspect of the Florida Supreme Court decision is not a subject of this appeal.



> without the aid of Congressional legislation . . . affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.' *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769, 65 S.Ct. 1515, 1520, 89 L.Ed. 1915 (1945). Accord, *Hughes v. Oklahoma*, 441 U.S. 322, 326 and n. 2, 99 S.Ct. 1727, 1731, 60 L.Ed.2d 250 (1979); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328, 97 S.Ct. 599, 606, 50 L.Ed.2d 514 (1977). Appellees' argument, moreover, defeats, rather than supports, the cause it aims to promote. For to say that California has created a problem susceptible only of congressional—indeed, only of international—solution is to concede that the taxation of foreign-owned containers is an area where a uniform federal rule is essential. California may not tell this Nation or Japan how to run their foreign policies." *Japan Line Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 454–455 (1979).

This Court has never sanctioned a tax of the kind involved here on a foreign owned instrumentality of foreign commerce.

**Appellant, a foreign national, performs foreign air transportation services subject to the strict regulation of the Federal Government.**

Just as in the *Japan Line* case, the Appellant is a foreign national engaged exclusively in international commerce. Appellant here operates its common carrier air service, based in Canada, to and from the United States pursuant to operating authority granted to it by, and subject to the strict regulations of the Federal Government (the Civil Aeronautics Board, the Department of

Transportation, and the Department of State, principally).

Appellant's Canada-U.S. charter air services is authorized by the Federal Government through a foreign air carrier permit[9] (Appendix I, p. A-73) granted to Appellant by the Civil Aeronautics Board pursuant to section 402 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1372.[10] CAB Order 80-8-97 (Appendix I, p. A-68), issuing a foreign air carrier permit to Appellant, shows that said Order and permit were presented to the President of the United States pursuant to section 801(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1461(a), to determine whether the permit would be disapproved by him on the basis of "foreign

[9] Only a "foreign air carrier" may obtain an operating permit to engage in foreign air transportation pursuant to section 402 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1372. A "foreign air carrier" is defined by section 101 (22) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1301(22), to mean "any person, not a citizen of the United States, who undertakes . . . to engage in foreign air transportation." Foreign air transportation is defined by section 101(24) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1301 (24) to mean "the carriage by aircraft of persons or property as a common carrier for compensation or hire in commerce between . . . a place in the United States and any place outside thereof. . . ." U.S. nationals generally obtain authority to operate in foreign air transportation through section 401 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1371.

[10] Effective January 1, 1985 (section 1601(b)(2) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1551(b)(2)) "The authority of the Board under this Act with respect to foreign air transportation is transferred to the Department of Transportation which shall exercise such authority in consultation with the Department of State." Section 1601(b)(1)(B) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1551(b)(1)(B).



relations or national defense considerations", and the President on August 18, 1980, notified the CAB that the President did not intend to issue a disapproval. Appellant's permit limits its Canada-U.S. service to service authorized by the Nonscheduled Air Services Agreement between the United States and Canada, TIAS 7826, 25 UST 787, (May 8, 1974). Appendix I, p. A-48.

Section 802 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1462, authorizes the Secretary of State to negotiate agreements such as the U.S./Canada Nonscheduled Air Services Agreement.[11] Section 1102(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1502 (a), requires the CAB and the Department of Transportation in administering the Federal Aviation Act to act in accordance with obligations assumed by the United States through such agreements.

**Aviation fuel used by Appellant is an instrument of foreign commerce, and therefore is the subject of Federal regulation.**

As in the *Japan Line* case, a state, Florida in this case, has unilaterally imposed a tax on an instrumentality of commerce, in this case aviation fuel, used exclusively for

[11] Section 802 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1462, is virtually identical to section 802 of its predecessor aeronautics act, the Civil Aeronautics Act of 1938. The Conference Report as to section 802 of the latter act states that "This section authorizes negotiations by the State Department of agreements with foreign governments for the establishment of air routes and services between the United States and foreign countries. . . . Section 802 of the conference agreement merely requires the State Department to advise the Authority of all negotiations relating to such matters and consult with the Authority with respect to them." H. R. Rep. No. 2635 (Conf. Rep.), 75th Cong. 3d sess., 76 (June 7, 1938).

foreign commerce purposes by a foreign national, Appellant. That the aviation fuel in question is an instrumentality of foreign commerce there can be no doubt. *Japan Line* sets the test for that determination. *Japan Line Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 445–446 (1979). In *Japan Line*, this Court determined that the transport containers being taxed by California were instrumentalities of foreign commerce based on international agreements (cited in note 10 of the *Japan Line* decision) to which the United States was a party granting such containers an exemption from import duties and taxes while the containers are engaged in foreign commerce. Comparable international agreements exist to which the Federal Government is a party providing comparable tax relief as to Appellant's aviation fuel purchases used in the performance of Appellant's foreign air commerce operation.

The U.S./Canada Nonscheduled Air Services Agreement, TIAS 7826, 25 UST 787 (May 8, 1974), negotiated and executed on behalf of the U.S. by the Executive Branch of the Federal Government pursuant to section 802 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec 1462, in Article XII provides for an exemption from certain taxes, fees and duties, among them being import and customs duties and restrictions on fuel

> "taken on board aircraft of the carriers of one Contracting Party in the territory of the other Contracting Party and intended solely for use in international air services . . . whether or not such items are consumed wholly within the territory of the Contracting Party granting the exemption." Appendix H, p. A-58.

Article 24(a) of the Convention on International Civil Aviation (The Chicago Convention), 61 Stat. 1180, TIAS



1591, ratified by the U.S. on August 9, 1946, provides a similar exemption. See, page 4, *infra*. Both Canada and the United States are signatories to that Convention. Since the tax exemptions through international agreements for aviation fuel used by Appellant to operate its aircraft in foreign air commerce provide tax exemptions of the type granted for shipping containers involved in *Japan Line* and such exemptions were the bases in *Japan Line* for a determination that the subject transport containers were instruments of foreign commerce, then the aviation fuel used by Appellant must be construed as an instrumentality of foreign commerce and therefore the subject of Federal regulation. *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 445–446, 448 (1979). In this case Appellant is also providing a common carrier air service to and from the United States pursuant to authority issued to it by the Federal Government limited to foreign commerce as set forth in the U.S./Canada Nonscheduled Air Services Agreement. There can be no concern then that the fuel uplifted in Florida by Appellant will be used for purposes other than foreign commerce.

**The Florida tax on Appellant's Florida aviation fuel uplifts violates the need for uniformity of Federal regulation in foreign commerce and is therefore unconstitutional under the Commerce Clause.**

Since the subject aviation fuel is an instrumentality of foreign commerce there must be a consideration as to whether the Florida fuel tax prevents uniform regulation by the Federal Government of foreign air commerce with foreign governments. If the Florida fuel tax violates this principle it is unconstitutional and therefore invalid. *Japan Line Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 451

(1979). The Florida tax on Appellant's aviation fuel uplifted in Florida fails this test.[12]

International air commerce between this Nation and others is no *laissez-faire* field of service. Such foreign air commerce is a highly regulated, a highly structured segment of commerce strictly controlled by the Federal Government. That tight Federal control has survived and under current legislation will continue to survive the virtually complete deregulation in the domestic field of air transport. The Federal Government shapes the course of foreign air commerce through its powers over licensing, route services and other air services, rates and fares, competition, and its power to negotiate air transport agreements with foreign nations in order to move toward the realization of Federal foreign air transport goals set forth in section 1102(b) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1502(b). The ability of the Federal Government to negotiate air transport agreements of various types with foreign nations without interference by any of the individual states of this Nation is an imperative.

International air transport agreements between the U.S. and other nations exist on a complex world-wide basis. In its letters to Florida's Department of Revenue the U.S. State Department—the principle branch of the Federal Government authorized by Congress through

[12] The Florida Second Circuit judgment, granting Appellant a permanent injunction against the Florida Department of Revenue from assessing and collecting fuel taxes from Appellant found "Senate Bill 8A inconsistent with the undertakings of United States government in international bilateral agreements designed to establish federal uniformity and prevent retaliatory taxes on U.S. carriers." Appendix C, p. A-22.



section 802 of the Federal Aviation Act to negotiate international air transport agreements—warned Florida that the imposition of its fuel tax on foreign airlines would "frustrate" the purposes of such agreements and the reciprocal arrangements that have been established by the Federal Government, and trigger retaliation through the imposition of similar taxes by foreign governments on the airlines of the United States generally. For, in foreign commerce, as observed in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 456 (1979), "Even a slight overlapping of tax—a problem that might be deemed *de minimis* in a domestic context—assumes importance when sensitive matters of foreign relations and national sovereignty are concerned."

If other states of the U.S. adopt a similar tax on aviation fuel used in foreign air commerce by foreign airlines—a highly probable prospect if Florida's fuel tax is found valid—the intrusion by U.S. states in this field and the inevitable retaliatory responses by foreign nations to such taxation will further erode the ability of the Federal Government to achieve viable working relationships with other nations so necessary to foster a sound and effective international air transport system. The power of the Federal Government to achieve Federal goals in foreign air commerce would be seriously weakened. The ability of the Federal Government to fulfill its obligations under international air transport agreements and reciprocal arrangements it enters into with other Nations would be substantially impaired. The inevitability of this sequence of events was the basis for this Court to hold that a tax on an instrumentality of foreign commerce by a state is unconstitutional. *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 450–454 (1979). The same conclusion is as applicable to the state tax involved in this case: it

violates the Commerce Clause of the United States Consitution.

**Florida has no power to impose a tax affecting the policies of the Federal Government in foreign commerce and foreign relations, and it is therefore unconstitutional under the Supremacy Clause.**

Florida with its tax on fuel uplifted by foreign nationals in Florida for use in foreign commerce has intruded in an area, foreign air commerce, in which Florida has no power, in an area where the Federal Government holds the power exclusively, where policy considerations and the power to achieve foreign air transportation goals have been vested by the Congress of the United States in the Federal Government.[13] Pursuant to that power and in order to achieve the international air transportation goals set forth by Congress in section 1102(b) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1502(b), bilateral and multilateral international air transport agreements have been entered into by our Federal Government with other nations for years.[14] The long standing

[13] For the principal provisions of the Federal Aviation Act of 1958 relevant to this case granting such powers, see pages 4–7, *supra*.

[14] President Truman in a message to the Senate submitting the Chicago Convention took note of the fact that international commercial bilateral air transport agreements had been entered into without ratification "under authority vested in me". International Civil Aviation Conference, Message from the President, 79th Cong., 2d sess. 92 Cong. Rec. 6661–6662 (June 11, 1946). The Attorney General, in supporting the President's position on executing bilateral agreements without ratification cited the Constitution plus sections 801, 802 and 1102 of the Civil Aeronautics Act of 1938 as amended, putting the air bilateral agreements in the category of "agreements made pursuant to existing legislation." 40 Op. Att'y Gen. 451 (1948). It is to be noted that one of the agreements involved was the bilateral air transport agreement between this country and the United Kingdom which has been a keystone for our transatlantic scheduled service operations. See, M. Whiteman 14 *Digest of International Law* 219–221 (1970).



policy of the Federal Government through its bilateral agreements is exemplified by the Nonscheduled Air Services Agreement between the United States and Canada. Appendix H, p. A-48. It seeks to preserve, protect and promote the continued development of a system of air transportation between the U.S. and Canada able to accommodate the transportation needs of their people with a minimum of artificial restraints, free from discriminatory practices, based on the equitable exchange of economic benefits, and exemptions on a reciprocal basis from taxes on the instruments of foreign air commerce, aviation fuel being one such instrument of foreign commerce. That international air transport agreement and the policy it adopts is not novel. It is entirely consistent with the international air transportation policy contained in section 1102(b) of the Federal Aviation Act. There are many international bilateral agreements with reciprocal objectives similar to those of the U.S./Canada Nonscheduled Air Services Agreement including provisions providing for an exemption from taxes on aviation fuel.[15] The

[15] E.g., Art. 7(d) *Aviation Transport Services Agreement*, United States/Colombia, TIAS 5338, 14 UST 432 (Oct. 24, 1956); Art. 7(d) *Air Transport Services Agreement*, United States/Mexico, TIAS 4675, 12 UST 60 (Aug. 15, 1960); Art. 4(c) *Air Transport Services Agreement*, United States/Venezuela, TIAS 2813, 4 UST 1495 (April 13, 1953); Art. 3(b) *Commercial Air Transport Agreement*, United States/Ecuador, TIAS 1606 (Jan. 8, 1947), as amended TIAS 2196, 2 UST 482 (Jan. 3, 10, 1951); Art. 3(2) *Air Transport Services Agreement*, United States/United Kingdom, TIAS 1507 (Feb. 11, 1946); Art. 3(b) *Air Transport Services Agreement*, United States/Chile, TIAS 1905 (May 10, 1947); Sec. F(2,3) *Air Transport Services Agreement*, United States/Argentina, TIAS 8978, 29 UST 2795 (Sept. 22, 1947).

United States has bilateral air transport agreements seeking to achieve the same purposes with over 70 foreign countries. See Appendix J, p. A-82.

The Federal Government pursuant to its continuing policy has been agressive in its efforts to eliminate the imposition of fuel taxes on U.S. air carriers imposed by other nations.[16] Quite naturally, the imposition of such a tax by an individual state of this Nation on the aviation fuel uplift of foreign airlines jeopardizes those efforts. That is a key problem with the Florida fuel tax.

Prior to the enactment of the Florida fuel tax, the U.S. Department of State wrote to Florida's Department of Revenue apprising it of the existing Federal policy to exempt foreign airlines from taxes on aviation fuel and suggested that Florida include an exemption for foreign airlines from the Florida fuel tax in its legislation in order to "insure that U.S. airlines enjoy recriprocal treatment abroad". Appendix J, p. A-83. The State Department letter noted that

> "A few such governments have raised the possibility that state and local authorities in their jurisdictions could impose similar taxes on U.S. airlines. A proliferation of state and local taxes would frustrate the international system of recriprocal tax exemption and thereby significantly increase the cost of international air transportation." Appendix J, p. A-83.

[16] Civil Aeronautics Board ("CAB"), Fiscal Year ("FY") 1982/1981 Report to Congress at 94–96; CAB, FY 1980 Report to Congress at 84; CAB, FY 1979 Report to Congress at 103; CAB, FY 1978 Report to Congress at 96; CAB, FY 1977 and Transition Quarter Report to Congress at 106–109, 114–115; CAB, FY 1976 Report to Congress at 103–104.



After the Florida fuel tax was enacted, the Department of State again wrote Florida's Department of Revenue warning that "this tax will cause serious foreign relations problems unless provision is made to exclude foreign airlines." Appendix L, p. A-87.

When the Florida passed its legislation taxing aviation fuel used by Appellant and other foreign nationals solely for foreign air commerce purposes, it exceeded its powers and entered a field reserved exclusively to the Federal Government. This Court has stressed repeatedly that:

> "In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." *Board of Trustees of University of Illinois* v. *United States*, 289 U.S. 48, 59 (1933).

In *United States* v. *Pink*, 315 U.S. 203, 232–233 (1942), this Court held that

> "If state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a State created difficulties with a foreign power. . . .
>
> ". . . No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. . . ."

And in *United States* v. *Belmont*, 301 U.S. 324, 330–331 (1937), this Court stated this principal of exclusivity in these clear terms:

> "Government power over internal affairs is distributed between the national government and the several states. Governmental power over external

> affairs is not distributed, but is vested exclusively in the national government. . . .
>
> * * *
>
> ". . . In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the state of New York does not exist. . . ."

The acts of the individual state governments of the United States affecting foreign commerce are perceived by foreign nations as if they are the acts of the Federal Government, as if those acts were acts of the National Government even when those state acts are without Federal support and are opposed to Federal foreign policy. *Japan Lines, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 450–451, 453 (1979); *United States* v. *Pink*, 315 U.S. 203, 232–233 (1942); *United States* v. *Belmont*, 301 U.S. 324, 331 (1937); *Board of Trustees of University of Illinois* v. *United States*, 289 US 48, 57 (1933). From the standpoint of foreign nations, a fuel tax on fuel used in foreign commerce by foreign nationals is a national tax, no matter its origins or whether sanctioned by the Federal Government, since in foreign relations the individual states do not exist. *United States* v. *Belmont, supra* at 330–331. If a state action involving foreign relations and commerce runs counter to the terms agreed to by the Federal Government through its international agreements and reciprocal arrangements with foreign governments such state action is a virtual breach of the international obligations assumed by the Federal Government from the point of view of the foreign governments involved. The continued effectiveness of the Federal Government in international affairs without exclusive powers in that field would be jeopardized critically.

Congress, through the provisions contained in the Federal Aviation Act of 1958, as amended, has left no area of



foreign air commerce in which any state of the United States may exert any powers. In foreign air commerce and foreign relations affecting foreign air commerce the powers of the Federal Government are exclusive and plenary, and therefore they cannot be interfered with in any way through any form of state action. *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 448 (1979); *United States* v. *Pink*, 315 U.S. 203, 233 (1942); *Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941); *Board of Trustees of University of Illinois* v. *United States*, 289 U.S. 48, 56 (1933). Florida, like the other individual states have no powers in this field:

> "The Federal Government, representing as it does the collective interests of the . . . states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties.
>
> 'For local interests the several states of the Union exists, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.' Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." Footnote omitted. *Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941).

Florida's enactment of Florida Senate Bill 8A insofar as it taxes the aviation fuel pumped from Florida facilities for use by foreign nationals in foreign air commerce exceeds the powers granted to it under the Constitution of the United States, and therefore, such legislation violates the United States Constitution, not only the Commerce Clause, but the Supremacy Clause as well.

## CONCLUSION

For the foregoing reasons, it is earnestly requested that probable jurisdiction be noted.

Respectfully submitted,

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# 84-902

(11)



No.

IN THE

## Supreme Court of the United States

October Term, 1984

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WARDAIR CANADA INC.,

*Appellant,*

v.

STATE OF FLORIDA,
DEPARTMENT OF REVENUE,

*Appellee.*

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**ON APPEAL FROM THE SUPREME COURT OF FLORIDA**

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**APPENDIX**

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## Appendix A

# Supreme Court of Florida

## No. 64,036

DEPARTMENT OF REVENUE,
*Appellant,*

v.

WARDAIR CANADA, LTD.,
*Appellee.*

[June 14, 1984]

ADKINS J.

This case is before us on an order from the First District Court of Appeal certifying the issue in the case to be of great public importance. We have jurisdiction. Art. V, § 3(b)(5), Fla. Const.

This case arose with the filing of a complaint in the circuit court in Leon County by Wardair Canada, Ltd. (hereinafter Wardair) challenging the constitutionality of chapter 83-3, Laws of Florida. The court consolidated this case with an action filed by Air Jamaica for the purpose of trial. The parties stipulated to a procedure whereby the airline was allowed to self-accrue the sales tax imposed under chapter 83-3 during the pendency of the proceedings subject to certain conditions. The circuit court entered an order of final judgment on July 19, 1983, separate from its order in the Air Jamaica case. The court upheld

the constitutionality of the law dismissing three of Wardair's counts in its complaint but ruled in favor of the airline in recognizing an exemption to the airlines to the motor fuel and special fuel tax imposed by the law by virtue of certain executive agreements with the United States. The trial judge had previously upheld chapter 83-3 in *Delta Airlines, Inc. v. Department of Revenue*, No. 83-761 (Leon County Cir. Ct.—Civ. Div. May 23, 1983). The Department of Revenue filed its notice of appeal from the trial court's final judgment on July 21, 1983. Shortly thereafter, Wardair filed its notice of cross-appeal. The First District Court of Appeal then certified the case to this Court.

This Court has ruled on three of the four issues raised by Wardair in its original complaint and on cross-appeal in its decision in *Delta Airlines, Inc. v. Department of Revenue*, No. 63,915, (Fla. June 14, 1984). The department has appealed the circuit court's ruling recognizing an exemption to the excise tax for the foreign airlines. The circuit court found that chapter 83-3 was inconsistent with a Non-scheduled Air Service Agreement between the United States and Canada, May 8, 1974, T.I.A.S. 7826.

The circuit court's order noted that article XII(1) of the Air Services Agreement exempts both the United States and Canada from national duties and charges on fuels and article XIV provides that neither party will discriminate against the other. The court then relied on its holding in *Lineas Aereas Costarricenses, S.A. v. Department of Revenue*, No. 83-761 (Fla. 2d Cir. June 21, 1983). In that case the court held that when the federal policy is to exampt foreign airlines from fuel taxes and prevent discrimination, the individual states are precluded from acting in that area.



The department argues that the agreement is inapplicable to estop the enforcement of chapter 83-3 for two reasons: 1) the agreement is not self-executing; and 2) the agreement specifically addresses only national customs, duties, excise taxes and charges with no application to or restriction on state taxation schemes. The circuit court did not expressly recognize a distinction between executory and non-executory agreement provisions in its order.

The department asserts that the following provisions in the agreement are executory and thus require an additional legislative enactment to effect implementation:

> Each Contracting Party shall exempt the carriers of the other Contracting Party to the fullest extent possible under its national law from import restrictions, customs duties, excise taxes, inspection fees, and other national duties and charges on fuel, lubricants, consumable technical supplies . . . and other items intended for use solely in connection with the operation, maintenance or servicing of aircraft of the carriers of the other Contracting Party. The exemptions granted by this paragraph shall apply to items:
>
> (a) introduced into the territory of one Contracting Party by or on behalf of the carriers of the other Contracting Party;
> (b) retained on board aircraft of the carriers of one Contracting Party upon arriving in or leaving the territory of the other Contracting Party;
> (c) taken on board aircraft of the carriers of one Contracting Party in the territory of the other Contracting Party and intended solely for use in international air services; whether or not such items are consumed wholly within the territory of the Contracting Party granting the exemption.

Because we agree with the department's conclusion that the agreement is inapplicable because it specifically

addresses only national customs, duties, and excise taxes and charges, we find it unnecessary to determine whether these provisions are executory or not. The Air Services Agreement is not a treaty ratified by the United States Senate. However, it is a formally executed international agreement and, as such, is valid and binding as if approved by act of Congress. *United States v. Pink*, 315 U.S. 203 (1941). The purpose of the agreement is obviously to preserve, protect and promote the continued development of a system of air transport free from discriminatory practices and to support equal commercial opportunity between the nations.

The doctrine of preemption which is given effect through the supremacy clause mandates that federal law overrides any state regulation where there is an actual conflict between the two sets of legislation such that both cannot validly stand. The United States Supreme Court has formulated analytical standards for preemption. In *Hines v. Davidowitz*, 312 U.S. 52 (1941), the Court construed the Federal Alien Registration Act of 1940 to override Pennsylvania's Alien Registration Act of 1939. The Court noted that if state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," federal regulation must preempt state regulation to give effect to the desired national policy. *Id.* at 67.

Fifteen years later the validity of a Pennsylvania state regulation was again before the Court in *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). The Court held that federal anticommunist legislation superseded the state's sedition act and enunciated a three-prong test to determine the supremacy of a federal regulatory scheme over state regulation in the same or similar area. The test involves an analysis of: 1) the pervasiveness of the federal regulatory



scheme; 2) federal occupation of the field as necessitated by the need for national uniformity; and 3) danger of conflict between state laws and the administration of the federal program.

The provisions in the agreement between the United States and Canada clearly express an intent to apply to only national taxes and duties. We do not believe that the scheme of this agreement is so pervasive so as to permit the reasonable inference that Congress intended to preclude the state's power to tax. Also, the competitive equality between the two nations would be destroyed if the United States air carriers had to pay state excise taxes on fuel purchases and the Canadian carrier did not.

We determined in our decision in *Delta Air Lines, Inc. v. Department of Revenue*, No. 63,915 (Fla. June 14, 1984), that the tax imposed by chapter 83-3 met the four-prong test of *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), and thus did not violate the commerce clause. In 1979, the United States Supreme Court decided the case of *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), setting forth two additional requirements to be met when foreign commerce is involved. The Court stated:

> [A]n inquiry more elaborate than that mandated by *Complete Auto* is necessary when a State seeks to tax the instrumentalities of foreign, rather than interstate commerce. In addition to answering the nexus, apportionment, and nondiscrimination questions posed in *Complete Auto*, a court must also inquire, first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second whether the tax prevents the Federal Government from "speaking with one voice when regulating commercial relations with foreign governments." If a state tax contravenes

> either of these precepts, it is unconstitutional under the Commerce Clause.

*Id.* at 451.

The trial court correctly found that the first requirement of *Japan Line* was not a concern because there had been no de facto showing of multiple taxation or substantial risk of the same. *Moorman Manufacturing Co. v. Blair*, 437 U.S. 267; *Shell Oil Co. v. State Board of Equalization*, 414 P.2d 820 (Cal. 1966).

For the reasons previously discussed, we also hold that the tax meets the second requirement of *Japan Line*. The agreement provides for efforts at exemption from national excise taxes, inspection fees and other national charges but does not provide for exemptions from state excise taxes. We must presume this has been done intentionally. We do not believe this legislation prevents our federal government from speaking with one voice.

Accordingly, we affirm the order of the circuit court as to the constitutionality of chapter 83-3 except that portion of the law pertaining to a tax credit for Florida corporations. In *Delta* we determined that portion to be unconstitutional and it was stricken from the law. We reverse the circuit court to the extent that it recognized an exemption for foreign airlines.

It is so ordered.

ALDERMAN, C.J., BOYD and SHAW, JJ., Concur
OVERTON, J., Dissents with an opinion in which McDonald, J., Concurs

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

OVERTON, J., dissenting.



I dissent. I find that the State of Florida has no authority to ignore valid air service agreements between the United States Government and the governments of other countries which exempt airlines based in participating nations from duties and charges on fuels. In my view, the individual states of this country are precluded by those agreements from taxing fuel used by foreign airlines. To accept the majority's view means that all United States airlines could, in turn, be subject to local government taxation on fuel in foreign countries. We are one country and our constitution requires us to speak with one voice when the federal government enters into agreements and treaties with foreign governments. *See* U.S. Const. art. I, § 8; art. VI. This state is precluded from enforcing this tax against this airline.

McDONALD, J., Concurs

## Appendix B

# Supreme Court of Florida

**No. 63,915**

Delta Air Lines Inc.,
*et al., Appellants,*

v.

Department of Revenue,
*Appellee.*

[June 14, 1984]

ADKINS J.

This case is before us on an order from the First District Court of Appeal certifying the issue in the case to be of great public importance. We have jurisdiction. Art. V, § 3(B) (3), Fla. Const.

This case arose with the filing of a complaint by Delta Air Lines in the circuit court of Leon County seeking declaratory and injunctive relief from the enforcement of provisions of chapter 83-3, Laws of Florida, on the ground that the law was unconstitutional. Capitol Air, Inc., Northwest Airlines, Inc., Ozark Air Lines, Inc., Piedmont Aviation, Inc., Republic Airlines, Inc., The Flying Tiger Lines, Inc., United Airlines and USAir, Inc., were granted leave to intervene as party plaintiffs. On May 27, 1983, the circuit court entered its final judgment in favor of the Department of Revenue ruling the law constitutional. Delta appealed to the First District Court of Appeal which certified the case for immediate resolution by this Court.



We described the structure of chapter 83-3 and resolved some of the issues raised by Delta in our decision in *Eastern Air Lines v. Department of Revenue*, No. 63,949 (Fla. June 14, 1984). There are two issues which Delta raises which we were not faced with in that decision.

First, Delta raises the issue of whether chapter 83-3 violates the commerce clause of the United States Constitution by providing a corporate income tax credit for Florida-based airlines. Chapter 220, Florida Statutes (1981), imposes an income tax on domestic corporations and foreign corporations qualified to do business in Florida or actually doing business in Florida. Section 61 of chapter 83-3 creates section 220.189, Florida Statutes (1983), and provides a credit against the corporate income tax for air common carriers who have a corporate or business home office in Florida and also maintain a work force of more than 1200 employees in the state. This credit offsets up to one-half of the air carriers' fuel tax liabilities with a maximum credit of $5 million.

A state tax is not *per se* invalid because it burdens interstate commerce since interstate commerce may constitutionally be made to pay its own way. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). Taxes have been sustained against commerce clause challenges when the tax: 1) is applied to an activity with a substantial nexus with the taxing state; 2) is fairly apportioned; 3) does not discriminate against interstate commerce; and 4) is fairly related to the services provided by the state. *Complete Auto*, 430 U.S. at 279. No state may, consistent

with the commerce clause, "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457 (1959). This principle follows from the basic purpose of the commerce clause which is to prohibit preferential trade areas destructive of the free commerce anticipated by the United States Constitution. *Boston Stock Exchange*, 429 U.S. at 329; *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951).

In *Boston Stock Exchange* the United States Supreme Court found unconstitutional a state stock transfer tax containing credit provisions which had the effect of discriminating against interstate commerce to the direct commercial advantage of local business. The transfer tax was imposed if any one of five events (sale, transfer, delivery, etc.) occurred within the state. The rate of tax was based upon the price of the security. The total tax was determined by the number of shares involved in the taxable event. The imposition of the tax itself was found to be constitutional. However, the credit structure of the tax was found to be unconstitutional. The credit amendments to the tax resulted in a scheme in which intrastate sales received a preferential fifty percent reduction in the rate of tax imposed and were given a maximum tax ceiling of \$350. Out-of-state sales, however, were subject to the full tax rate without any ceiling. Because it imposed a greater tax liability on out-of-state sales than on in-state sales, the New York transfer tax fell "short of the substantially evenhanded treatment demanded by the [c]ommerce [c]lause." 429 U.S. at 332.

Another tax statute whose discriminatory credits and exemptions provided the basis for a finding of unconstitutionality was the Louisiana statute reviewed in *Maryland v. Louisiana*, 451 U.S. 725 (1981). There, a tax was imposed on certain uses of natural gas coming into the state. The tax was imposed to equalize competition between locally produced gas subject to the state's severance tax and gas coming into the state from the outer continental shelf which was free of the severance tax. The use tax provided an exemption for gas consumed within the state. It also provided a tax credit against severance taxes for all use taxes paid, thereby encouraging investment in local mineral exploration and development and discouraging investment and development of the outer continental shelf and other states. The Court found the statute unconstitutional in light of the descriminatory effect produced by the pattern of credits and exemptions which violated the principle of equality. 451 U.S. at 759.



The circuit court here found that "the tax is on fuel purchased *in* the state and all consumers are taxed equally" and thus concluded that there is no burden on interstate commerce similar to that found in *Maryland v. Louisiana*. The court misconstrued the nature of the discrimination worked against interstate commerce by the corporate tax credit. The question is not one of whether Florida may impose this tax on fuel purchased in Florida for use in interstate commerce. Rather the issue is whether the tax with its attendant credit provision produces a discriminatory effect on interstate commerce. The credit provision of chapter 83-3 clearly discriminates against interstate commerce because the corporate tax credit provides a *direct commercial advantage* to Florida-based air common carriers over non-Florida-based carriers.

The circuit court also found *Boston Stock Exchange* inapplicable stating that, in the present case, "the legisla-

ture is not trying to tax any out-of-state transactions." The circuit court misconstrued the holding in *Boston Stock Exchange*. The United States Supreme Court in *Boston Stock Exchange* was not concerned with whether the transaction occurred in New York or outside the state, but whether the credit structure of the tax favored in-state business and discriminated against interstate commerce.

The circuit court also relied on *Archer Daniels Midland Co. v. State*, 315 N.W.2d 597 (Minn. 1982). In *Archer Daniels* the Supreme Court of Minnesota struck down a tax credit statute similar to the Florida-based tax credit provided in chapter 83-3. Minnesota imposed an excise tax of thirteen cents per gallon on all gasoline sold in the state including gasohol. The taxing statute was amended in 1980 to provide a four cents per gallon partial exemption for gasohol made from Minnesota farm products and blended with alcohol distilled in Minnesota. A non-resident alcohol producer challenged the constitutionality of this statute alleging that the higher taxes imposed on non-resident producers discriminated against interstate commerce. The court found that the exemption violated the commerce clause noting that the act attempted to unfairly preserve local markets for local interests by conferring an artificial economic advantage to local interests under the state's taxing power. *Id.* at 599. The circuit court ruled that *Archer Daniels* dealt with out-of-state production or consumption and that chapter 83-3 in no way affects out-of-state production or consumption. This approach again overlooks the real issue in this case. Just as the Minnesota statute favored in-state gasohol producers, chapter 83-3 confers an artificial economic advantage on those interstate air carriers who maintain corporate or business home offices in Florida over those competing air carriers who base their corporate headquarters outside the state.



The circuit court continued its erroneous analysis under the commerce clause by referring to *Faircloth v. Mr. Boston Distiller Corporation*, 245 So.2d 240 (Fla. 1970), as supporting the proposition that this Court has upheld special tax exemptions to encourage Florida industry. The court's reliance on *Faircloth* is misplaced because that case involved a challenge to a state excise tax based upon equal protection and due process arguments. The commerce clause was not an issue in that case.

The circuit court has misconstrued the analysis necessary to determine whether a statute discriminates against interstate commerce. The test under the commerce clause is, as we have noted, whether the statute discriminates against interstate commerce by providing a direct commercial advantage to local commerce. The corporate income tax credit provides a direct commercial advantage to select Florida-based air carriers and thereby violates the commerce clause.

In *Eastern*, No. 63,949 (Fla. June 14, 1984), we discussed the proper analysis to determine whether a statutory provision was severable from the remainder of the statute. We find that the corporate tax credit provision, now section 220,189 (Florida Statutes 1983), can be logically separated from the remaining valid provisions of chapter 83-3 without hampering the legislature's intent to provide a transportation fund for the state. Thus, we strike that provision which extends a corporate income tax credit to Florida-based air carriers. We believe this will still accomplish the legislature's primary purpose—to tax corporations qualified to do business in Florida or actually doing business in Florida.

Delta also challenges section 6 of the law as being a road-user tax totally unrelated to the services provided

by the state and thus violative of the commerce clause. Delta states in its brief that the first gas tax and the corresponding first four cents of the special fuel tax formerly imposed under chapter 206, Florida Statutes (1981), levied an *excise* tax specifically on road-users. Delta also refers to the new provision as "the new sales tax." However, the thrust of Delta's agrument is that this tax is a *user* tax and, as such, fails the fourth prong of the text enunciated in *Complete Auto.* Delta argues that it and other interstate air common carriers do not use the roads in Florida and, therefore, the measure of the tax bears no relationship to Delta's presence or activities in the state.

We must disagree with Delta's argument. First, the tax is not a road-user tax. It is an excise tax imposed under part II of chapter 212, which is commonly referred to as the sales tax law of the state of Florida. The tax is imposed on the privilege of engaging in certain businesses, including the selling of motor fuels and special fuels in the state. *All purchasers* of motor fuel or special fuel are taxed on the incident of first withdrawal. The funds generated are to be deposited in a state transportation fund and are not, as Delta has asserted, to be restricted to only road use.

Our interpretation of this statute as an excise tax is consistent with prior United States Supreme Court decisions which reviewed similar statutes dealing with taxes on fuel used by airlines.

In 1933 the United States Supreme Court was faced with a challenge to a Tennessee statute which imposed an excise tax on the privilege of selling, storing, or distributing gasoline within the state. *Nashville, Chattanooga, & St. Louis Railway v. Wallace*, 288 U.S. 249 (1933). The proceeds of the tax were to be used solely in the construc-



tion and maintenance of a highway system in the state. The appellant rail carrier contended that the tax was in effect a tax upon the use of the gasoline in appellant's business as an interstate carrier and, thus, an unconstitutional burden on interstate commerce. *Id.* at 737. The court noted that gasoline having come to rest in storage is taxable by the state, notwithstanding its prospective *use* as an instrument of interstate commerce, much the same as a right of way, rolling stock, or other instruments of interstate commerce are subject to local property taxes. Accordingly, the Court stated:

> [T]here can be no valid objection to the taxation of the exercise of any right or power incident to appellant's ownership of the gasoline, which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in *Helson v. Kentucky*, supra. Here the tax is imposed on the successive exercise of two of those powers, the storage and withdrawal from storage of the gasoline. Both powers are completely exercised before use of the gasoline in interstate commerce begins. The tax imposed upon their exercise is therefore not one imposed on the use of the gasoline as an instrument of commerce and the burden of it is too indirect and remote from the function of interstate commerce itself to transgress constitutional limitations. . . .
>
> . . . [T]he levy is a tax, not a toll or charge for use of the highways. . . .

*Id.* at 268.

In *Eastern Air Transport, Inc. v. South Carolina Tax Commission*, 285 U.S. 147 (1931), the Supreme Court upheld a state tax on the sale of gasoline within the state. The suit was brought by an interstate air carrier which argued that the tax placed a direct burden on interstate commerce. The Court found that the tax, which was described in the statute as a license tax, was for the privilege

of carrying on the business of selling gasoline. The Court emphasized that under the circumstances the validity of the tax would not be affected by whether the tax was construed to be an excise tax or a property tax. The Court stated:

> There is no substantial distinction between the sale of gasoline that is used in an airplane in interstate transportation and the sale of coal for the locomotives of an interstate carrier, or of the locomotives and cars themselves bought as equipment for interstate transportation. A non-discriminatory tax upon local sales in such cases has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected.

*Id.* at 153.

Similarly, the Court upheld a Wyoming law which taxed all gasoline "used or sold" in the state and applied to all gasoline imported for use upon its withdrawal from storage tanks in *Edelman v. Boeing Air Transport, Inc.*, 289 U.S. 249 (1932). The Court described the tax in the following manner:

> The tax is applied to the stored gasoline as it is withdrawn from the storage tanks at the airport and placed in the planes. No tax is collected for gasoline consumed in respondent's planes either on coming into the State or on going out. It is at the time of withdrawal alone that "use" is measured for the purposes of the tax. The stored gasoline is deemed to be "used" within the State and therefore subject to the tax, when it is withdrawn from the tanks. . . .
>
> A State may validly tax the "use" to which gasoline is put in withdrawing it from storage within the State, and placing it in the tanks of the planes, notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce. Such a tax cannot be distinguished from that considered and upheld in *Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace*, supra. There it was pointed out that "there can be no valid objection to the taxation of the exercise of any right or power incident to . . . ownership of the gasoline which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in Helson v. Kentucky, 279 U.S. 245, 73 L. ed. 683, 49 S. Ct. 279." As the exercise of the powers taxed, the storage and withdrawal from storage of the gasoline, was complete before interstate commerce began, it was held that the burden of the tax was too indirect and remote from the function of interstate commerce, to transgress constitutional limitations.



*Id.* at 252 (emphasis supplied).

The Supreme Court of the United States has stated that the constitutional power of a state to tax does not depend upon the enjoyment of the taxpayer of any special benefit from the use of the funds raised by taxation. *Nashville, Chattanooga & St. Louis Railway v. Wallace*, 288 U.S. 249, 269 (1933). A state is free to pursue its own fiscal policies, "if by the practical operation of a tax the state has exerted power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society." *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444 (1940). *See also Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 625 (1981); *General Motors Corp. v. Washington*, 377 U.S. 436, 440–41 (1964). The relevant inquiry under the fourth prong of the *Complete Auto* test is not, as Delta seems to suggest, the *amount* of the tax or the *value* of the benefits allegedly bestowed as measured by the costs the state incurs on account of the taxpayer's activities. *Commonwealth Edison*, 453 U.S. at 625. The

first prong of *Complete Auto* clearly requires that the interstate business (here the airlines) have a substantial nexus with the state before *any* tax may be levied on it. The fourth prong of the test is intended to impose the additional limitation that the measure of the tax be reasonably related to the extent of the contact. *Id.* at 626; *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938).

This tax is unlike a true "user fee" or user tax. Perhaps the best illustration of a true user tax is found in *Evansville-Vanderburgh Airport Authority v. Delta Air Lines, Inc.*, 405 U.S. 707 (1972). In *Evansville-Vanderburgh* the United States Supreme Court reviewed a use tax imposed on airlines by an Indiana municipality. All interstate air carriers were charged a user service charge for each enplaning passenger. The monies collected were to defray the cost of airport construction and maintenance. The tax was upheld and found to be fairly related to the use of the facilities by the airlines.

The present tax is more analogous to that found in *Commonwealth Edison* where the United States Supreme Court upheld a Montana severance tax on coal. Coal producers challenged the tax contending that the severance tax had a discriminatory effect on interstate commerce since ninety percent of Montana's coal was shipped out-of-state and, therefore, the tax burden was borne primarily by out-of-state consumers. The Court found that the coal producers' claim hinged on an inquiry into the fourth prong of *Complete Auto*. First, the Court concluded that, contrary to appellant's contention, the severance tax was a general revenue tax. 453 U.S. at 621. The Court also concluded that the fourth prong of *Complete Auto* was satisfied by the Montana tax. The Court stated:



> Because it is measured as a percentage of the value of the coal taken, the Montana tax is in "proper proportion" to appellants' activities within the State and, therefore, to their "consequent enjoyment of the opportunities and protections which the State has afforded" in connection with those activities.

*Id.* at 626 (citing *General Motors Corp. v. Washington*, 377 U.S. at 440–41).

We believe the imposition of this excise tax on the *purchase* of motor fuel and special fuel in the state of Florida is fairly related to those purchasers' enjoyment of the protections and benefits afforded by the state and the privilege of doing business in an organized society. Delta operates in at least nine of the major airports throughout the state of Florida transporting persons and property and engaging in the business of operating a commercial airline for profit. The persons and property which are transported through the air by airlines such as Delta do not come to rest at the airports. Those persons and any property generally must then use the public roads and highways of the state in automobiles or trucks or some other means of public transportation. We must disagree with Delta's contention that the tax is invalid because it is not fairly related to the services provided by the state.

Accordingly, we affirm that portion of the circuit court's order which upheld section 6 of the law as not being violative of the commerce clause. But, we reverse the circuit court's order insofar as it upheld the corporate tax credit to Florida-based airlines and strike that section of chapter 83-3.

It is so ordered.

ALDERMAN, C.J., BOYD, OVERTON, McDONALD and SHAW, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.



## Appendix C

## IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

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## CASE NO. 83-1106

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WARDAIR CANADA (1975), LTD.
A Corporation organized and existing under the Laws of Canada,

*Plaintiff,*

vs.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

*Defendant.*

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**FINAL JUDGMENT**

This cause is before the Court on final hearing on the pleadings, evidence and arguments of counsel for the respective parties and on the briefs of counsel for the parties, and the Court having considered all of same and being otherwise advised in the premises, it is

**ORDERED AND ADJUDGED:**

1. The Plaintiff asserts that Senate Bill No. 8A, Chapter 83-3, Laws of Florida, titled "an act relating to transportation finance and administration":

COUNT I: violates the Commerce Clause of the United States Constitution,

COUNT II: violates the Equal Protection clauses of the United States Constitution and the Constitution of the State of Florida,

COUNT III: violates Article III, Sections 10 and 11 of the Constitution of the State of Florida and is a special law,

COUNT IV: is inconsistent with Non-scheduled Air Services Agreement between the United States and Canada, May 8, 1974, T.I.A.S. 7826.

2. Wardair is certified by the United States Civil Aeronautics Board Order 80-8-97, July 18, 1980, Docket 27817, effective August 18, 1980.

3. The preamble to the Air Services Agreement, T.I.A.S. 7826, states that in recognition of the geographic situation of Canada and the United States the relationship between the two peoples creates a unique international civil aviation situation. To ensure "the continued development of a system of air transport free from discriminatory practices, based on an equitable exchange of economic benefits to the two countries: this agreement was reached between the two countries "to accommodate the needs of the people of the two countries with a minimum of artificial restraint". Article XII(1) exempts the parties from national duties and charges on fuel. Article XIV provides that neither party will discriminate against the other. These provisions read together illustrate a federal policy designed to encourage free and unencumbered air transportation between the United States and Canada. As this Court held in *Lineas Aereas Costarricenses, S.A. v. Department of Revenue*, Case No. 83-761 (2d Cir. Fla. June 1, 1983) when the federal policy is to exempt foreign airlines from fuel taxes and prevent any discrimination so as to further the free flow of international aviation, the



individual states are precluded from acting in this area and from preventing the United States from "speaking with one voice", which is an inquiry which must be made pursuant to *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), when dealing with foreign commerce restrictions. For the reasons stated in the *Lineas Aereas Costarricenses*, supra, decision and because the language of this Air Transport Services Agreement is basically the same as the Agreements in that decision, this Court finds Senate Bill 8A inconsistent with the undertakings of the United States government in international bilateral agreements designed to establish federal uniformity and prevent retaliatory taxes on U.S. carriers.

4. The allegations in Courts I, II, and III were disposed of in this Court's decision in *Delta Air Lines, Inc. v. State of Florida, Department of Revenue*, Case No. 83-761 (2d Cir. Fla. May 23, 1983) and these allegations are likewise disposed in this case, finding them without merit.

ACCORDINGLY, IT IS FURTHER ORDERED AND ADJUDGED:

A. This Court finds and determines that Chapter 83-3, Laws of Florida, also referred to as Senate Bill 8A, is a valid enactment and is not in conflict with the Equal Protection clauses of the United States Constitution (14th Amendment) nor the Florida Constitution (Article I, Section 2) nor with the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3) for the reasons stated in *Delta Airlines*, supra.

B. It is further found that Senate Bill 8A is inconsistent with the undertakings of the United States government in international bilateral agreement with Canada, T.I.A.S. 7826.

C. Plaintiff's Counts I, II, and III are hereby finally dismissed.

D. Plaintiff's Count IV is found to be meritorious and Plaintiff is here granted a permanent injunction against Defendant Department of Revenue from assessing and collecting fuel taxes pursuant to Senate Bill 8A.

E. This Court upholds the constitutionality of Senate Bill 8A, but recognizes an exemption from the fuel tax for Plaintiff foreign airlines who entered an executive agreement with the United States prior to the enactment of this Bill.

DONE AND ORDERED, at Tallahassee, Leon County, Florida, this 19th day of July, 1983.

BEN C. WILLIS, Circuit Judge



## Appendix D

## IN THE SECOND CIRCUIT COURT IN AND FOR LEON COUNTY, FLORIDA

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## CASE NO: 83-964

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LINEAS AEREAS COSTARRICENSES, S.A.,
a Costa Rican Corporation,

*Plaintiff*

vs.

STATE OF FLORIDA,
DEPARTMENT OF REVENUE

*Defendant.*

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### FINAL JUDGMENT

This cause is before the Court on final hearing on the pleadings, evidence and arguments of counsel for the respective parties and the intervenors, and on the briefs of counsel for the parties, and the Court having considered all of same and being otherwise advised in the premises, it is

### ORDERED AND ADJUDGED:

1. The Plaintiff asserts that Senate Bill No. 8-A, Chapter 83-3, Laws of Florida, title "an act relating to transportation finance and administration":

COUNT I: discriminates against foreign airlines in violation of Congress' exclusive power over foreign com-

merce, pursuant to Article I, Section 8, Clause 3 of the United States Constitution,

COUNT II: is inconsistent with the Air Transport Services Agreements lawfully entered into by the President of the United States.

COUNT III: denies foreign airlines equal protection of the laws under the United States Constitution.

COUNT IV: violates Article I, Section 9, of the Florida Constitution because there is no reasonable relationship between the taxes imposed and the services provided to foreign airlines, and

COUNT V: is a special law in violation of Sections 10 and 11 of Article III of the Constitution of the State of Florida.

Plaintiff prays for a permanent injunction to prevent Defendant Department of Revenue (DOR) from assessing and collecting fuel taxes pursuant to Senate Bill 8-A.

2. In light of this Court's recent decision in *Delta Air Lines, Inc. v. State of Florida, Department of Revenue*, Case No. 83-761, (Leon County Circuit Court—Civil Division, May 23, 1983), the assertion in Counts I, III, IV, and IV are without merit. However, the Court finds merit in the assertion in Count II and hereby grants a permanent injunction for the reasons subsequently discussed. This Court upholds the constitutionality of Senate Bill 8-A but recognizes an exemption for foreign airlines based on the bilateral agreements entered into between the federal government and Plaintiffs and intervenors in this case.[1]

[1] Commercial Air Transport Agreement, January 8, 1947, United States—Ecuador, T.I.A.S. 1606; Aviation Transport Services Agree-



**DISCUSSION**

The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, vests with Congress the exclusive power to regulate foreign commerce. The Supremacy Clause, Article 4, Section 2, states that the Constitution and the laws made pursuant thereto are the supreme law of the land. Therefore, when Congress traditionally regulates in a certain area such as in the present case by extending reciprocal agreements to foreign airlines to "strengthen even more the cultural welfare and economic bonds . . . and ensure continued development in the common welfare on bases of equality and reciprocity", Air Transport Services Agreement with Mexico, p. 1, the states are preempted or superseded from acting in this area. Further, Congress has extended federal tax exemption from custom duties, inspection fees, excise taxes, and other national duties or charges to foreign airlines "in order to prevent discriminatory practices and to assure equality of treatment." Air Transport Services Agree-

ment, October 24, 1956, United States—Colombia, T.I.A.S. 5338; Air Transport Services Agreement, April 13, 1953, United States—Venezuela, T.I.A.S. 2813; Air Transport Services Agreement, August 15, 1960, United States—Mexico, T.I.A.S. 4675; Air Transport Services Agreement, May 10, 1947, United States—Chile, T.I.A.S. 1905; Air Transport Services Agreement, September 22, 1977 United States—Argentina, T.I.A.S. 978; Air Transport Services Agreement, February 11, 1946, United States—United Kingdom, T.I.A.S. 1507; Aviation Agreement, November 22, 1961, United States—United Kingdom, T.I.A.S. 4955; Memorandum of Consultations, April 25, 1982, United States—Brazil: Memorandum of Understanding, August 17, 1979.

ment with Mexico, Article 7,[2] and that the respective authorities will attempt to facilitate maximum efficiency "with a fair and equal opportunity" for the airlines to operate on the designated routes. Mexico Agreement, Aritcle 8.[3]

Defendant contends that the "fair and equal opportunity" refers only to routes and does not affect excise tax imposition. Fuel is an essential factor in an airlines' operation, and if its price is increased, the cost to fly to a specific destination in likewise increased. This will adversely affect the economic feasibility of flying to that destination. The foreign airlines involved in this suit fly only between their country and specified cities in the United States. In Florida that city is Miami. They engage in no intrastate or interstate flights, but are confined to flights between their country and the specific city. If a particular state imposes a substantial increase in the cost of flying to a certain city, it is only logical that this disadvantage would inhibit the airlines' desire to continue flying to that city. Therefore, tax imposition does substantially affect the

[2] Similar or equal provisions appear in the Air Transport Services Agreements listed in footnote 1 as follows: Venezuela Agreement—Article 4; Chile Agreement—Article 3; Ecuador Agreement—Article 3; United Kingdom Agreement—Article 3; Costa Rica Memorandum—Article 9; Brazil Agreement—Article 9; Colombia Agreement—Article 7; Argentina Agreement—Section 2(F).

[3] Similar or equal provisions appear in the Air Transport Services Agreements listed in footnote 1 as follows: Venezuela Agreement—Annex IV(b); Chile Agreement—Annex A.A; Ecuador Agreement—Annex Section 1.A; Costa Rica Memorandum—Article 9(5), Brazil Memorandum—Section IX. Colombia Agreement—Article 8; Argentina Agreement—Section 2(F).



established route and denies the airlines a fair and equal opportunity to serve that route.

It is noteworthy that in the Argentina Agreement, Section 2(F)(3), the wording is that the civil aeronautics authorities will endeavor to ensure "exemption from taxes", without specifying exemption only from national taxes. Most of the agreements specify the referral is to national taxes and Defendant emphasizes this point in its brief as indicating Congress intentionally did not exempt state or local taxes. Consistent with this reasoning, however, Argentina could submit that the failure to specify would imply the federal government would make efforts to ensure exemption from all taxes—state, local, etc. In fact, the memorandum agreement with Costa Rica, Article 9(5) does in fact state that "each party shall use its best efforts to secure for the designated airlines of the other Party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by State, regional and local authorities".

In arguing that Congress' failure to specifically exempt state taxes in the majority of the agreements, Defendant cites *Finland v. Town of Pelham*, 290 N.Y.S.2d (1966), to demonstrate an express statement of Congress in a treaty as compared to the non-express statements in the present agreements. However, it cannot be concluded that whenever Congress does not speak to an issue that the intent is to affirm state regulation in that area by negative implication. Congress cannot be expected to speak to all aspects of a given situation. The United States Supreme Court spoke directly on this situation in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979):

> "The premise of Appellees' argument is that a State is free to impose demonstrable burdens on commerce, so long as Congress has not preempted

> the field by affirmative regulation. But it long has been 'accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation . . . affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.' " *Southern Pacific Company v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945).

Similarly, Defendant argues that the agreements between the United States and Costa Rica, Brazil, Trinidad and Tobago, and Honduras are executory and require affirmative legislative action to validate them. *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979). The court in Postal states at page 875:

> "it was early decided that treaties affect the municipal law of the United States only when those treaties are given effect by congressional legislation or are, by their nature, self-executing."

but goes on to say at page 876:

> "The question whether a treaty is self-executing is a matter of interpretation for courts when the issue presents itself in litigation . . . and, as in the case of all matters of interpretation, the court's attempt to discern the intent of the parties to the agreement so as to carry out their manifest purpose."

The agreements involved here have no express language that further legislation is necessary, and because, as will be discussed, the federal government recognizes these agreements as effective, this court discredits any argument that these agreements are ineffective because further legislative action is needed. As Plaintiff informs the Court, the challenged agreements are in effect pending exchange of ratification, and the Civil Aeronautics Board



recognizes these agreements as effective by having granted Foreign Air Carrier Permits to Costa Rica and by recognizing the validity of the Brazil agreement in decisions. The T.I.A.S. agreements 1507, 4955, and 5209 govern air transportation with Trinidad and Tobago, such agreements made between the United Kingdon and United States. Although no T.I.A.S. agreement exists for Honduras, TAN, the national carrier, has been authorized by the Civil Aeronautics Board C.A.B. Order 82-6-98 (June, 1982). Even if there were a valid distinction between the effectiveness of an executory agreement as opposed to an executed agreement, the Court here is examining the federal *policy* considerations behind the agreements and these considerations strongly indicate lenient tax burdens on foreign carriers. The agreements, executory or executed, are evidence of this policy as the Supreme Court stated in *United States v. Pink*, 315 U.S. 203, 231 (1941) as "superior Federal policy evidenced by a treaty or international compact or agreement."

Defendant argues in its brief that Plaintiff is trying to elevate the agreements to the status of treaties and appears to discredit this elevation; yet Defendant's cites involve treaties which implies Defendant's recognition of that status. *Pink* appears to treat international agreements with the same to status of treaties, so the distinction is irrelevant.

Regarding the non-express language in the agreements, Defendant cites *Guarantee Trust Co. v. United States*, 304 U.S. 126, 143 (1938):

> "Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them."

In the present case, it seems to be the state who is trying to override the privileges extended to foreign carriers by

the federal government, not vice versa. All the bilateral agreements were in effect before Senate Bill 8-A, dating back to 1947 (Ecuador), 1948 (Chile), 1953 (Venezuela) etc. This would seem to indicate that the federal government had established their policy of reciprocal tax exemptions before the State acted. It is, therefore, the state who is impairing a federal right, not vice versa. Defendant also cites *United States v. Pink* at 230:

> "It is of course true that even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy."

However, *Pink* goes on to say at p. 231:

> "But state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international agreement."

Using the *Pink* analysis, derogation from the State's authority in this case is in fact necessary because the apparent policy expressed in the bilateral agreements is for reciprocal tax advantages. This precludes the state from acting in a manner to "frustrate the achievements of federal uniformity." *Japan Line*, p. 450. The federal concern for equal commercial opportunity between nations supports the policy of Congress to exempt foreign airlines from excise taxes.

The Supreme Court of the United States in *United States v. Belmont*, 301 U.S. 324,331 (1947), has rather clearly stated the applicable principle as follows:

> "in the case of all international compacts and agreements . . . that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states."



The test to be used when a state attempts to regulate foreign commerce was articulated in *Japan Line*, page 451:

> "an inquiry more elaborate than that mandated by *Complete Auto* is necessary when a State seeks to tax the instrumentalities of foreign, rather than of interstate, commerce. In addition to answering the nexus, apportionment, and nondiscrimination questions posed in *Complete Auto*, a court must also inquire, first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and second, whether the tax prevents the Federal Government from 'speaking with one voice' when regulating commercial relations with foreign governments."

The first requirement is not a concern in the present case because there has been no de facto showing of multiple taxation, and, as the court stated in *Moorman Manufacturing v. Bair*, 437 U.S. 267 (1978), the court will not invalidate a statute where the risk of multiple taxation is merely "speculative." It is the second requirement which concerns the court in the present case. It is not overlooked that in *Japan Line* the tax was an ad valorem levy on certain containers used in seagoing vessels of Japan, whereas in this case the tax is upon the withdrawing of expendable fuel from storage. However, the principle of both seems applicable. The levy on the fuel, which is a sine qua non to movement of the aircraft, seems to be within the class of burdens which the international agreements seek to prevent.

The United States, consisting of fifty individual state governments united under one flag, must present a united front when dealing in economic affairs with other nations. Over the years the federal government has negotiated these bilateral agreements to prevent price discrimina-

tion toward U. S. carriers in other nations, these being reciprocal agreements. There have been continuing efforts of the Civil Aeronautics Board to eliminate fuel taxes imposed by other nations.[4] Also, in 1974 Congress enacted the International Air Transportation Fair Competitive Practices Act, 88 Stat. 2102, to protect U.S. carriers from discrimination. By allowing the fifty states to impose individual state taxes, it would thwart the purpose of these federal efforts and infringe on the federal power to regulate foreign commerce.

Concern for Florida's fuel tax was expressed by the United States Department of State in a letter to the Florida Department of Revenue on September 29, 1982 from Matthew V. Scocozza, Deputy Assistant Secretary of State for Transportation and Telecommunication. This letter stated that the United States afforded an exemption from federal taxes and this if individual states imposed taxes it would "frustrate the international system of reciprocal tax exemptions and thereby significantly increase the cost of international air transportation. After reassurances from the Florida DOR in their letter of October 25, 1982, that airlines continued to enjoy "generous tax advantages", Senate Bill 8-A was enacted. The Department of State reacted by sending their letter of March 17, 1982 (date is a typographical error and should read "1983") that the Department was "surprised and distressed" to hear of the changes in the Florida fuel tax

[4] Civil Aeronautics Board ("CAB"). Fiscal Year ("FY") 1982/1981 Report to Congress at 94–96; CAB, FY 1980 Report to Congress at 84; CAB, FY 1979 Report to Congress at 103; CAB, FY 1978 Report to Congress at 96; CAB, FY 1977 and Transition Quarter Report to Congress at 106–109, 114–115; CAB, FY 1976 Report to Congress at 103–104.



as applied to airlines. Mr. Scocozza's first letter spoke of a "generally-accepted and long-standing international practice of reciprocally exempting such items from taxes".

In *Japan Line* at page 448 the Court talks of state taxes in reference to the second "national-uniformity" requirement:

> "a state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential. Foreign commerce is pre-eminently a matter of national concern."

At page 449 of *Japan Line* the Court cites *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976) as follows:

> "the Federal Government must speak with one voice when regulating commercial relations with foreign governments."

The *Japan Line* court then discusses several ways a state tax may "frustrate the achievements of federal uniformity", page 450. Among these concerns are asymmetry in international tax structure and retaliatory taxes against American-owned instrumentalities present in other nations:

> "Such retaliation of necessity would be directed at American Transportation equipment in general, not just that of the taxing State, so that the Nation as a whole would suffer." Page 430.

**ACCORDINGLY, IT IS FURTHER ORDERED AND ADJUDGED:**

A. This Court finds and determines that Chapter 83-3, Laws of Florida, also referred to as Senate Bill 8-A, is a valid enactment and is not in conflict with the Equal Protection clauses of the United States Constitution (14th Amendment) nor the Florida Constitution (Article I, Sec-

tion 2); nor with the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3) for the Reasons stated in *Delta Air Lines, Inc. v. State of Florida, Department of Revenue*, Case No. 83-761 (Leon County Circuit Court—Civil Division, May 23, 1983).

B. It is further found that Senate Bill 8-A is inconsistent with the undertakings of the United States government in international bilateral agreements with Plaintiff and intervenor foreign airlines.

C. Plaintiff's Counts I, II, IV, and V are hereby dismissed finally.

D. Plaintiff and Intervenors are granted a permanent injunction against Defendant DOR assessing and collecting fuel taxes pursuant to Senate Bill 8-A. Count II of Plaintiff's Complaint is meritorious.

E. This court upholds the constitutionality of Senate Bill 8-A, but recognizes an exemption from the fuel tax for Plaintiff and Intervenor foreign airlines who have entered executive agreements with the United States prior to the enactment of this Bill.

DONE AND ORDERED, at Tallahassee, Leon County, Florida, this 1st day of June, 1983.

BEN C. WILLIS,
Circuit Judge



## Appendix E

## Mandate

## Supreme Court of Florida

*To the Honorable, the Judges of the* Circuit Court in and for Leon County, Florida

*WHEREAS, in that certain cause filed in this Court styled:*

*DEPARTMENT OF REVENUE v. WARDAIR CANADA, LTD.*

*Case No.* 64,036

*Your Case No.* 83-1106

*The attached opinion was rendered on* June 14, 1984,

*YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.*

*WITNESS the Honorable* Joseph A. Boyd, Jr.

*Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this* 12th day of September, 1984.

*Clerk of the Supreme Court of Florida.*

IN THE SUPREME COURT OF FLORIDA
WEDNESDAY, SEPTEMBER 12, 1984

| | |
|---|---|
| DEPARTMENT OF REVENUE, *Appellant*, | ** |
| | ** CASE NO. 64,036 |
| vs. | ** Circuit Court Case No. 83-1106 (Leon) |
| WARDAIR CANADA, LTD., | ** |
| *Appellee.* | ** |

On consideration of the motion for rehearing filed by attorneys for appellee, and response thereto,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

BOYD, C.J., ADKINS, OVERTON, ALDERMAN, McDONALD and SHAW, JJ., Concur

BY /s/____________________
DUBLIN CAUSSEAUX
Deputy Clerk



## Appendix F

FILED
SID J. WHITE
Nov. 15, 1984
Clerk, Supreme Court

IN THE
**Supreme Court of Florida**

Case No. 64,036

STATE OF FLORIDA,
DEPARTMENT OF REVENUE
*Appellant*,
v.
WARDAIR CANADA (1975), LTD.,
*Appellee*.

**NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES**

Notice is hereby given that Wardair Canada Inc.[1] the appellee in this Case No. 64,036, hereby appeals to the Supreme Court of the United States from the entire final judgment of the Supreme Court of Florida entered in this

[1] Appellee in the above styled proceeding, Wardair Canada (1975), Ltd., changed its corporated name to its present one, Wardair Canada Inc., and that corporate name change has been approved by the Civil Aeronautics Board, CAB Order 83-12-54.

action on June 14, 1984 (motion for rehearing denied by the Supreme Court of the State of Florida on September 12, 1984), except that part reversing the order of the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, which upheld the corporate tax credit to Florida based airlines and striking that section of Chapter 83-3, Law of Florida.

This appeal is taken pursuant to 28 U.S.C. section 1257(2).

Respectfully submitted,

WALTER D. HANSEN
BURWELL, HANSEN, MANLEY & PETERS
1706 New Hampshire Avenue, N.W.
Washington, D. C. 20009
(202) 745-0441
*Attorney for Appellee*

Dated: November 13, 1984

**CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of November, 1984, copies of this Notice of Appeal were served on all parties required to be served by first class mail, postage prepaid, and properly addressed as follows:

Larry Levy
General Counsel
Department of Revenue
State of Florida
Room 203
Carlton Building
Tallahassee, Florida 32301



I further certify that on this 13th day of November, 1984, copies of this Notice of Appeal were served on the court possessed of the record, the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, by first class mail, postage prepaid and properly addressed as follows:

Clerk of Circuit Court
Circuit Court of the Second Judicial Circuit
In and For Leon County
P.O. Box 726
301 S. Monroe Street
Tallahassee, Florida 32302

WALTER D. HANSEN

## Appendix G

### Senate Bill No. 8-A

A bill to be entitled An act relating to transportation finance and administration; adding subsections (21) and (22) to s. 212.02, Florida Statutes, 1982 Supplement; amending s. 212.05(1), Florida Statutes, 1982 Supplement, and adding subsection (4); amending s. 212.055(1), Florida Statutes, as amended; amending ss. 125.0165(1) and 212.08(4), Florida Statutes, 1982 Supplement; creating part II of chapter 212, Florida Statutes; providing for the imposition of the tax on sales, use, and other transactions on the sale of motor and special fuels; providing that provisions which provide for the taxation of fuels used by certain vehicles licensed as common carriers, and vessels, engaged in interstate or foreign commerce on the basis of the ratio of intrastate to interstate mileage do not apply to aircraft. . . .

* * *

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (21) and (22) are added to section 212.02, Florida Statutes, 1982 Supplement, to read:

212.02 [FLA. STAT. ANN. §212.02 (West Supp. 1984)] Definitions.—The following terms and phrases when used in this chapter shall have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning:

(21) "Motor fuel" means and includes what is commonly known and sold as gasoline and fuels containing a mixture of gasoline and other products.





(22) "Special fuel" means any liquid product, gas product, or combination thereof used in an internal combustion engine or motor to propel any form of vehicle, machine, or mechanical contrivance. This term shall include, but not be limited to, all forms of fuel commonly or commercially known or sold as diesel fuel, kerosene, butane gas, or propane gas, and all other forms of liquefied petroleum gases.

* * *

Section 5. Subsection (4) of section 212.08, Florida Statutes, 1982 Supplement, is amended to read:

212.08 [FLA. STAT. ANN. §212.08 (West Suppl. 1984)] Sales, rental, storage, use tax; specified exemptions. . . .

(4) EXEMPTIONS, ITEMS BEARING OTHER EXCISE TAXES, ETC.—Also exempt are water (not exempting mineral water or carbonated water), and; all fuels used by a public or private utility, including any municipal corporation or rural electric cooperative association, in the generation of electric power or energy for sale. Fuel other than motor fuel and special fuel is taxable as provided in this part, except that fuel expressly exempt herein.; and Motor fuels and special fuels on ~~which a tax is imposed by chapter 296 and 297~~ are taxable as provided in part II. ~~All other fuels are taxable,~~ except that those used by vehicles, other than aircraft, which are licensed as common carriers by the Interstate Commerce Commission ~~or by the Civil Aeronautics Board~~ to transport persons or property in interstate or foreign commerce and vessels used to transport persons or property in interstate or foreign commerce are taxable under this part only to the extent provided herein. The basis of the tax shall be the ratio of intrastate mileage to interstate or foreign mileage traveled by the carrier dur-

ing the previous fiscal year of the carrier, such ratio to be determined at the close of the carrier's fiscal year. This ratio shall be applied each month to the total purchases made in this state of gasoline and other fuels to establish that portion of the total used and consumed in intrastate movement and subject to tax under this chapter. . . .

Section 6. Part II of chapter 212, Florida Statutes, consisting of sections 212.60, 212.65, 212.70, 212.80, 212.90, 212.91, 212.92, 212.94, and 212.95, is created to read:

* * *

212.70 [FLA. STAT. ANN. §212.70 (West Suppl. 1984)] Tax imposed on sale of motor fuel and special fuel; tax upon ultimate consumer; determination by department; notification.—

(1) A tax shall be imposed for the privilege of the sale at retail in this state of motor fuel and special fuel.

(2)(a) This levy of tax is upon the ultimate retail consumer. It is hereby provided as a matter of administrative convenience and necessity that the tax shall be paid upon the first sale or transfer of title within this state, whether by a distributor, dealer, or retail dealer, who shall act as agent for the state in the collection of said tax whether such distributor, dealer, or retail dealer is the ultimate seller or not.

* * *

(3) Prior to June 1 of each year, the department shall determine the appropriate sales tax applicable to the retail price per gallon of motor fuel and special fuel as follows:

(a) The department shall determine the appropriate





total motor fuel and special fuel retail price, including any federal, state and local excise taxes on such fuel, for the forthcoming 12-month period beginning June 1, by adjusting the initially established price by the percentage change in the average monthly gasoline price component of the Consumer Price Index, issued by the United States Department of Labor, for the most recent 12-month period ending March 31, compared to said average for the 12-month period ending March 31, 1984. However, the adjustment provided herein shall first be made for the forthcoming 12-month period beginning June 1, 1985.

(b) The tax per gallon shall be computed as 5 percent of said total retail price, rounded to the nearest one-tenth of one cent.

(c) The initially established price is $1.148 per gallon.

(4) The department shall notify each distributor, dealer, and retail dealer of the amount of sales tax to be imposed and collected pursuant to this part on each gallon of motor fuel and special fuel for the 12-month period beginning June 1.

* * *

Section 13. Section 206.42, Florida Statutes, is amended to read:

206.42 [FLA. STAT. ANN. §206.42 (West Supp. 1984)] Aviation motor fuel exempt from <u>excise</u> tax.—Each and every dealer in aviation motor fuel in the state by whatever name designated who sells aviation motor fuel testing 78 octane number (A.S.T.M. method D-357-33T) or higher, of such quality not adapted for use in ordinary motor vehicles, being designed for and sold and exclusively used for aircraft motors, is exempted from the payment of any and all excise taxes levied by the state

CODING: Words in ~~struck through~~ type are deletions from existing law; words underlined are additions.

upon such motor fuel, except the tax levied under part II of chapter 212.

* * *

Section 38. Section 339.08, Florida Statutes, 1982 Supplement, is amended to read:

339.08 [FLA. STAT. ANN. §339.08 (West Supp. 1984)] Use of gas tax revenue by department.—

(1) The department shall by regulation provide for the expenditure of the moneys in the State Transportation Trust Fund ~~proceeds of the first gas tax~~ accruing to the Division of Road Operations, in accordance with its annual budget.

(2) Such regulations shall provide that the use of said moneys ~~the first gas tax~~ be restricted to the following purposes:

(a) To pay administrative expenses of the department, including administrative expenses incurred by the several state road districts.

(b) To pay the cost of construction of the State Highway System and State Park Road System, including amounts necessary to match federal aid funds for such purposes. The department shall also match federal aid highway funds allocated to the county road and city road systems.

(c) To pay the cost of maintaining the State Highway System and State Park Road System.

(d) To make such other lawful expenditures of the department for the payment of which no other funds may be specified, including the payment of compensation to employees of the Division of Road Operations except those employees whose jobs are designated as "J" in the official





Florida merit system pay plan for overtime work in excess of 40 hours per week or other accepted standard work week, in cash or by way of compensatory time as may be prescribed by regulation of the department. Any other laws in conflict herewith are hereby repealed:

(a) To pay the cost of maintaining state roads which were classified or maintained as primary roads on January 1, 1956, and not included by the road board in the state primary highway system when said system was reclassified by the road board in June 1956, pursuant to the provisions of this code.

* * *

Section 64. (1) This section, sections 1 through 6, and sections 54, 55, 56, and 62 of this act shall take effect March 14, 1983, provided that:

(a) The tax imposed pursuant to part II of chapter 212, Florida Statutes, as created by this act, shall be due and payable commencing April 1, 1983.

* * *

# Appendix H

**RELEVANT PROVISIONS OF THE NONSCHEDULED AIR SERVICE AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF CANADA, TIAS 7826, 25UST 787 (Signed & entered into force May 8, 1974)**

The Government of the United States of America and the Government of Canada,

Being Parties to the Convention on International Civil Aviation opened for signature at Chicago on the seventh day of December 1944,[1]

Desiring to conclude an Agreement for the purpose of promoting nonscheduled air services,

Recognizing that the geographic situation of the two countries, including the location of their main centers of population, and the close relationship between their two peoples create a situation unique in international civil aviation,

Desiring to ensure the continued development of a system of air transport free from discriminatory practices, based on an equitable exchange of economic benefits to the two countries, and able to accommodate the needs of the people of the two countries with a minimum of artificial restraint arising from the existence of their common border,

Desiring to ensure equitable opportunity for the air carriers of the two countries to participate in the development of this system and to make optimum use of modern equipment,

[1] TIAS 1591, 3756, 5170, 6605, 6681, 7616; 61 Stat. 1180; 8 UST 179; 13 UST 2105; 19 UST 7693; 20 UST 718; 24 UST 1019. [Footnote added by the Department of State.]



Recognizing the existence, continuing importance, and contribution to international aviation of the Air Transport Agreement for vital scheduled services,[2] and of the Agreement on Air Transport Preclearance of air travellers,[3]

Believing furthermore that the Air Transport Agreement for scheduled air services between their territories and the Agreement on Air Transport Preclearance of air travellers should be complemented by an agreement covering nonscheduled air services between their territories, and

Desiring to ensure the orderly development of such nonscheduled air services consistent with their interests in maintaining a sound system of scheduled air services between their respective territories,

Have agreed as follows:

## ARTICLE I

For the purpose of this Agreement:

(a) "Agreement" shall mean this Agreement, the Annexes attached thereto, and any amendments thereto.

(b) "Aeronautical authorities" shall mean, in the case of the United States of America, the Federal Aviation Administration with respect to the technical permission and safety standards and requirements referred to in

[2] TIAS 5972, 7824; 17 UST 201 . . . [Footnote added by the Department of State.]

[3] TIAS 7825 . . . [Footnote added by the Department of State.]

Articles III and VI (2) respectively, otherwise the Civil Aeronautics Board, and in the case of Canada, the Canadian Air Transportation Administration with respect to the technical permission and safety standards and requirements referred to in Articles III and VI (2) respectively, otherwise the Canadian Transport Commission, or in both cases, any person or agency authorized to perform the functions exercised at present by those authorities.

(c) "Carrier" or "carriers" shall mean an air carrier or carriers designated by one Contracting Party in writing to the other Contracting Party to be a carrier which will operate any of the nonscheduled air services provided for in this Agreement.

(d) "Territory" in relation to a Contracting Party shall mean the land areas under the sovereignty, jurisdiction or trusteeship of the Contracting Party, and territorial waters adjacent thereto.

(e) "Traffic" shall mean such traffic as is specifically provided for in the Annexes attached hereto.

(f) "Nonscheduled air service" shall mean such air service as is specifically provided for in the Annexes attached hereto.

(g) "Enplane" shall mean the first taking on board of nonscheduled air service traffic on an aircraft of a carrier.

(h) "Deplane" shall mean any deboarding of nonscheduled air service traffic from an aircraft of a carrier but shall not include deboarding for nontraffic purposes.

(i) "Re-enplane" shall mean any taking on beard on an aircraft of a carrier of nonscheduled air service traffic which has enplaned and deplaned.



(j) "Air Transport Agreement" shall mean the Air Transport Agreement between the Government of the United States of America and the Government of Canada signed on January 17, 1966, as amended, or any agreement which may supersede it.

(k) "Rates" shall be deemed to include all tariffs, tolls, fares, and charges for transportation, and the conditions of carriage, classifications, rules, regulations, practices, and services related thereto.

## ARTICLE II

1. Each Contracting Party grants to the other Contracting Party the rights specified in the Annexes attached hereto for the carriers of the other Contracting Party to enplane, deplane, and re-enplane nonscheduled air service traffic.

2. Nothing herein is intended to affect services not covered by this Agreement.

## ARTICLE III

1. Each Contracting Party shall have the right to designate, by diplomatic note to the other Contracting Party, a carrier or carriers to operate any of the nonscheduled air services provided in this Agreement.

2. Upon receipt of a designation made by one Contracting Party, and upon receipt from the carrier of an application or applications in the form and manner prescribed for such applications, the aeronautical authorities of the other Contracting Party shall grant to the carrier, subject to the provisions of Articles IV and VI, and with a minimum of procedural delay, appropriate licensing and tech-

nical authorization to operate the nonscheduled air services provided for in this Agreement.

3. The aeronautical authorities of one Contracting Party may require a carrier of the other Contracting Party to satisfy them that it is qualified to fulfill the conditions prescribed under the laws and regulations normally and reasonably applied by them to the operation of international commercial air services.

## ARTICLE IV

1. Each Contracting Party reserves the right to withhold, revoke or impose conditions on the authorization referred to in Article III with respect to a carrier of the other Contracting Party in the event that:

(a) Such carrier fails or ceases to qualify before the aeronautical authorities of the first Contracting Party under the laws and regulations normally applied by those authorities;

(b) Such carrier fails to comply with the laws and regulations referred to in Article V; or

(c) The first Contracting Party is not satisfied that substantial ownership and effective control of such carrier are vested in the Contracting Party designating the airline or in nationals of that Contracting Party.

2. Unless immediate action is essential to prevent further infringement of the laws and regulations referred to in Article V, the right to revoke the authorization provided for in paragraph 1 above shall be exercised only after consultation with the other Contracting Party.



## ARTICLE V

1. The laws and regulations of one Contracting Party relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of the carrier or carriers of the other Contracting Party, and shall be complied with by such aircraft upon entrance into, departure from, and while within the territory of the first Contracting Party.

2. The laws, regulations, and procedures of one Contracting Party relating to the admission to or departure from its territory of passengers, baggage, cargo or crew of aircraft, including regulations and procedures relating to prevention of unlawful interference with aircraft, entry, clearance, immigration, passports, customs, and quarantine shall be complied with by or on behalf of such passengers, baggage, cargo or crew of the carrier or carriers of the other Contracting Party upon entrance into, departure from, and while within the territory of the first Contracting Party.

## ARTICLE VI

1. Certificates of airworthiness, certificates of competency, and licenses issued or rendered valid by one Contracting Party, and still in force, shall be recognized as valid by the other Contracting Party for the purpose of operating the services provided for in this Agreement, provided that the requirements under which such certificates or licenses were issued or rendered valid are equal to or above the minimum standards which may be established pursuant to the Convention on International Civil Aviation. Each Contracting Party reserves the right,

however, to refuse to recognize, for the purpose of flights above its own territory, certificates of competency and licenses granted to its own nationals by the other Contracting Party.

2. The competent aeronautical authorities of each Contracting Party may request consultations concerning the safety standards and requirements relating to aeronautical facilities, operations, airmen, and aircraft, which are maintained and administered by the other Contracting Party. If, following such consultations, the competent aeronautical authorities of either Contracting Party find that the other Contracting Party does not effectively maintain and administer safety standards and requirements in these areas that are equal to or above the minimum standards which may be established pursuant to the Convention on International Civil Aviation, they will notify the other Contracting Party of such findings and the steps considered necessary to bring the safety standards and requirements of the other Contracting Party up to standards at least equal to the minimum standards which may be established pursuant to said Convention, and the other Contracting Party will take appropriate corrective action. Each Contracting Party reserves the right to withhold or revoke the technical authorization referred to in Article III of this Agreement with respect to a carrier of the other Contracting Party, or to impose conditions on such authorization, in the event the other Contracting Party does not take such appropriate action within a reasonable time.

## ARTICLE VII

1. Each Contracting Party shall have the right to promulgate and enforce laws and regulations governing nonscheduled air service. Such regulations shall be applied consistently with this Agreement and without discrimination against or among carriers of the other Contracting Party.



2. Where both Contracting Parties have promulgated regulations governing the same specific type of service covered in an Annex, the regulations of the Contracting Party in whose territory the enplanement occurs shall govern, unless otherwise agreed.

3. Where one Contracting Party has promulgated regulations governing a specific type of service covered in an Annex, and the other Contracting Party has not, that other Contracting Party shall accept the applicability of such regulations with respect to traffic enplaned in the territory of the first Contracting Party, unless otherwise agreed.

4. Each Contracting Party shall have the right, if the other Contracting Party promulgates regulations which alter the basic character of a specific type of service covered in an Annex, to refuse to accept the applicability of such regulations with respect to traffic enplaned in the territory of that other Contracting Party, notwithstanding the provisions of paragraphs 2 and 3 above. Such action shall normally be taken only after consultation with the other Contracting Party.

5. Either Contracting Party may submit to the other Contracting Party proposed new specific types of service for inclusion in an Annex to this Agreement. Such proposals shall normally be accompanied by explanatory statements. The other Contracting Party shall either accept the new specific types of service within sixty days of receipt, in which case they shall be incorporated into an Annex to the Agreement by an exchange of diplomatic

notes; or it shall indicate a willingness to consult promptly with the first Contracting Party.

6. Each Contracting Party may adopt and apply requirements relating to licensing procedures, administrative matters, or the collection of information, such as requirements concerning tariffs, traffic data, manifests, and similar matters.

## ARTICLE VIII

The volume of nonscheduled air service traffic between the territories of the two Contracting Parties enplaned by the carriers of one Contracting Party in the territory of the other Contracting Party shall be reasonably related to the volume of such traffic enplaned by carriers of the first Contracting Party in its own territory and deplaned or reenplaned in the territory of the other Contracting Party, taking into account the nature of the respective markets. Provisions to implement this Article shall be established in the Annexes to this Agreement.

## ARTICLE IX

1. Nonscheduled air service traffic between the territories of the two Contracting Parties transported by the carriers of one Contracting Party shall not cause substantial impairment of the scheduled air services of the scheduled airlines of the other Contracting Party or of the nonscheduled air services of the carriers of the other Contracting Party.

2. Unless otherwise agreed, neither Contracting Party may impose: (a) any requirement that prior approval be obtained for any individual flight or series of flights by a carrier or carriers of the other Contracting Party which



has qualified before the competent aeronautical authorities of the first Contracting Party; or (b) any restrictions on such carrier or carriers with respect to capacity, frequency or type of aircraft employed on nonscheduled air services provided for by this Agreement.

## ARTICLE X

If, after review over a period of time, the laws or reguations of either Contracting Party or the operations by the carrier or carriers of one Contracting Party performed pursuant to this Agreement appear to the other Contracting Party to constitute substantial impairment of the scheduled or nonscheduled air services of the scheduled airlines or the carriers of the other Contracting Party, that other Contracting Party may request consultations in accordance with Article XV.

## ARTICLE XI

1. The rates to be charged by the carriers of either Contracting Party for carriage to or from the territory of the other Contracting Party shall be reasonable, considering all relevant factors bearing upon the economic characteristics of prescribed nonscheduled air services provided for in this Agreement.

2. If the aeronautical authorities of one Contracting Party are dissatisfied with a proposed or existing rate of a carrier or carriers of the other Contracting Party, that other Contracting Party shall be so informed and the Contracting Parties shall exercise their best efforts to resolve the matter through prior consultations. Each Contracting Party shall retain the right to apply its laws and regulations with respect to such rates.

3. The aeronautical authorities of each Contracting Party shall exercise their best efforts to ensure that the rates charged and collected conform to the rates filed and in effect with each Contracting Party, and that no carrier rebates any portion of such rates by any means, directly or indirectly, including the payment of excessive sales commissions to agents.

## ARTICLE XII

1. Each Contracting Party shall exempt the carriers of the other Contracting Party to the fullest extent possible under its national law from import restrictions, customs duties, excise taxes, inspection fees, and other national duties and charges on fuel, lubricants, consumable technical supplies, spare parts including engines, regular equipment, ground equipment, stores, and other items intended for use solely in connection with the operation, maintenance or servicing of aircraft of the carriers of the other Contracting Party. The exemptions granted by this paragraph shall apply to items:

(a) introduced into the territory of one Contracting Party by or on behalf of the carriers of the other Contracting Party;

(b) retained on board aircraft of the carriers of one Contracting Party upon arriving in or leaving the territory of the other Contracting Party;

(c) taken on board aircraft of the carriers of one Contracting Party in the territory of the other Contracting Party and intended solely for use in international air services;

whether or not such items are consumed wholly within the territory of the Contracting Party granting the exemption.



2. The exemptions provided by this Article shall also be available in situations where a carrier or carriers of one Contracting Party have entered into arrangements with one or more carriers or airlines to receive and use on loan or on transfer in the territory of the other Contracting Party the items specified in paragaph 1 above, provided that each such other carrier or airline is similarly entitled to such exemptions from the other Contracting Party.

## ARTICLE XIII

1. Each Contracting Party may impose or permit to be imposed just and reasonable charges for the use of public airports and other facilities under its control, provided that such charges shall not be higher than the charges imposed for the use of such airports and facilities by its national aircraft engaged in similar international services.

2. Neither Contracting Party shall give a preference to its own carriers over the carriers of the other Contracting Party in the application of its customs, immigration, quarantine, and similar regulations or in the use of airports, airways, and other facilities under its control.

## ARTICLE XIV

Neither Contracting Party shall discriminate against a carrier or among carriers of the other Contracting Party providing the services covered by this Agreement.

## ARTICLE XV

Either Contracting Party may at any time request consultations on the interpretation, application or amendment of this Agreement. Such consultations should

commence as soon as practicable but not later than sixty days from the date of receipt of the request for consultations, unless otherwise agreed by the Contracting Parties.

## ARTICLE XVI

1. Any dispute with respect to matters covered by this Agreement not satisfactorily resolved through consultation shall, upon request of either Contracting Party, be submitted to arbitration in accordance with the procedures set forth herein.

2. Arbitration shall be by a tribunal of three arbitrators constituted as follows:

(a) One arbitrator shall be named by each Contracting Party within two months of the date of delivery by either Contracting Party to the other of a request for arbitration. Within one month after such period of two months, the two arbitrators so designated shall by agreement designate a third arbitrator, provided that such arbitrator shall not be a national of either Contracting Party.

(b) If either Contracting Party fails to designate an arbitrator, or if the third arbitrator is not agreed upon in accordance with subparagraph (a) above, either Contracting Party may request the President of the Council of the International Civil Aviation Organization to designate the necessary arbitrator or arbitrators.

3. The Contracting Parties shall use their best efforts consistent with national law to put into effect any decision or award of the arbitral tribunal.



4. The expenses of the arbitral tribunal, including the fees and expenses of the arbitrators, shall be shared equally by the Contracting Parties.

## ARTICLE XVII

Either Contracting Party may at any time notify the other Contracting Party by diplomatic note of its intention to terminate this Agreement. Such notice shall be sent simultaneously to the International Civil Aviation Organization. The Agreement shall terminate one year after the date of receipt of the notice of intention to terminate, unless by agreement between the Contracting Parties such notice is withdrawn before the expiration of that time.

## ARTICLE XVIII

This Agreement shall come into force on the day it is signed.

## SPECIFIED RIGHTS

**I. Definitions**

For the purpose of providing the services covered by this Agreement and its Annexes:

A. "Large aircraft" shall mean an aircraft having both:

(1) a maximum passenger capacity of more than 30 seats or a maximum payload capacity of more than 7,500 pounds; and

(2) a maximum authorized take-off weight on wheels greater than 35,000 pounds.

B. "Small aircraft" shall mean an aircraft which is not a "large aircraft" as defined above.

C. "Maximum passenger capacity" and "maximum payload capacity" shall have the meanings assigned to them in regulations of the Civil Aeronautics Board.

D. "Maximum authorized take-off weight on wheels" shall have the meaning assigned to it in regulations of the Canadian Transport Commission.

**II. United States of America**

Subject to the requirements of this and other Annexes to the Agreement, a carrier or carriers of the United States of America, when providing the services prescribed in Annex B to this Agreement for the movement of nonscheduled air service traffic between a point or points in the territory of one Contracting Party and a point or points in the territory of the other Contracting Party (including transportation by other modes on either an outgoing or return leg of a round-trip journey), shall be entitled to:

A. Enplane (and subsequently deplane on return trips) at any point or points in the territory of Canada nonscheduled air service traffic which is to be deplaned or re-enplaned at any point or points in the territory of the United States.

B. Deplane or re-enplane at any point or points in the territory of Canada nonscheduled air service traffic which has been enplaned at any point or points in the territory of the United States.



**III. Canada**

Subject to the requirements of this and other Annexes to the Agreement, a carrier or carriers of Canada, when providing the services prescribed in Annex B to this Agreement for the movement of nonscheduled air service traffic between a point or points in the territory of one Contracting Party and a point or points in the territory of the other Contracting Party (including transportation by other modes on either an outgoing or return leg of a round-trip journey), shall be entitled to:

A. Enplane (and subsequently deplane on return trips) at any point or points in the territory of the United States nonscheduled air service traffic which is to be deplaned or re-enplaned at any point or points in the territory of Canada.

B. Deplane or re-enplane at any point or points in the territory of the United States nonscheduled air service traffic which has been enplaned at any point or points in the territory of Canada.

* * *

**V. Conditions and Interpretations**

A. Transportation under this Agreement of traffic having a prior, subsequent or intervening movement by any mode of air transportation to or from territories other than those of the United States and Canada is prohibited, except for passengers moving independently of any group.

B. The performance of any otherwise authorized nonscheduled air service by a carrier as an aircraft lessee shall be considered as an operation under this Agreement, subject to conditions which either Contracting Par-

ty may establish governing "dry" or "wet" leases. However, operations conducted by a carrier as a lessor of an aircraft shall not be deemed to be within the scope of this Agreement insofar as the lessor is concerned.

* * *

F. A carrier of one Contracting Party may not take on board at one point in the territory of the other Contracting Party nonscheduled air service traffic destined for another point or points in the territory of such other Contracting Party. However, a carrier of one Contracting Party may provide a stopover at any such points to:

(1) Nonscheduled air service traffic in passengers carried on large aircraft which has been enplaned in the territory of the Contracting Party of which such carrier is a national and which is moving under a contract providing for nonscheduled air service transportation on the same carrier to or from a point or points in the territory of the Contracting Party of which such carrier is a national, even if a different aircraft is used; and. . . .

* * *

## PRESCRIBED SERVICES

**I. Definitions**

For the purpose of providing the services prescribed in this Annex:

A. "Nonscheduled air service" shall be limited to "charter air service" permitted hereunder.

B. "Traffic" shall mean passengers, including their accompanied baggage, and property, but shall not include passengers and property moved under contract to the military authorities of either Contracting Party.



C. "Charter air service" shall mean commercial air transportation of traffic on a time, mileage or trip basis by a carrier or carriers, where the entire planeload capacity of one or more aircraft has been engaged.

D. "Single Entity" shall, with respect to enplanements in the Territory of Canada, have the meaning assigned to "entity" in the regulations of the Canadian Transport Commission.

E. "Property" shall, with respect to enplanements in the Territory of Canada, have the meaning assigned to "goods" in the regulations of the Canadian Transport Commission.

**II. Prescribed Service Types—Large Aircraft**

The following types of charter air service may be performed with large aircraft for enplanements by carriers in the territories indicated:

| Types | Territory |
|---|---|
| A. As set forth in Civil Aeronautics Board Regulations | |
| Single Entity Passenger | United States of America |
| Single Entity Property | |
| Pro Rata Affinity | |
| Mixed (Entity/Pro Rata) | |
| Inclusive Tour | |
| Study Group | |
| Overseas Military Personnel | |
| Travel Group | |
| NOTE: The same aircraft may be chartered to more than one charterer and/or for transportation of more than one group solely pursuant to conditions set forth in the regulations referred to above. | |

| Types | Territory |
| --- | --- |
| B. As set forth in Canadian Transport Commission Air Carrier Regulations | |
| Single Entity Passenger ) | Canada |
| Single Entity Property ) | |
| Pro Rata Common Purpose ) | |
| Advance Booking ) | |
| Inclusive Tour ) | |

NOTE: The same aircraft may be chartered to more than one charterer and/or for transportation of more than one group solely pursuant to conditions set forth in the regulations referred to above.

* * *

### IV. Conditions and Requirements

A. The aeronautical authorities of the Contracting Party in which the traffic is to be enplaned may withhold approval with respect to charterworthiness of a flight, series of flights or part of a series of flights proposed to be operated by a carrier of the other Contracting Party if the charterworthiness criteria, conditions and requirements established by the first Contracting Party are not met, provided, however, that:

(1) Notification of any withholding of such approval is given to the carrier within (a) 30 days of the initial filing in the case of other than single entity charters, or (b) 10 days of the initial filing in the case of single entity charters;

(2) Any such withholding of approval shall be withdrawn if the charterworthiness criteria, conditions, and requirements are subsequently met; and



(3) Approval may be revoked at any time if the charterworthiness criteria, conditions, and requirements are not met.

B. Charterworthiness criteria, conditions, and requirements shall be applied by the aeronautical authorities of the Contracting Party in which the traffic is to be enplaned on an objective and non-discriminatory basis to the carriers of both Contracting Parties.

# Appendix I

**UNITED STATES OF AMERICA**
**CIVIL AERONAUTICS BOARD**
**WASHINGTON, D.C.**
**Order 89-8-97**

Adopted by the Civil Aeronautics Board at its office in Washington, D.C. on the 18th day of July, 1980

**Docket 27817**

Application of
WARDAIR CANADA (1975), LTD.
for renewal and amendment of foreign air carrier permits pursuant to section 402 of the Federal Aviation Act of 1958, as amended

**ORDER**

By Order 80-6-150, adopted June 24, 1980, the Board directed all interested persons to show cause why the Board should not, subject to the disapproval of the President, renew and amend two foreign air carrier permits held by Wardair Canada (1975), Ltd. The first permit authorizes, for an indefinite period, charter flights of persons and their accompanied baggage, and property between any point or points in Canada and any point or points in the United States, subject to conditions. The second permit authorizes, for a period of five years: (a) circle tour charter flights originating and terminating in Canada and serving a point or points in the United States and a point or points in a third country; (b) charter flights originating at a point or points in 20 named European countries and serving any point or points in the United States; (c) circle tour charter flights originating and terminating at the same point or points in 20 named European countries and serving a point or points in the United States and a point or points in any country other than the named European countries and the United States; and (d) charter flights, other than those described above, subject to prior Board approval. The charter authority described in (a), (b), and (c) above is limited to the carriage of persons and their accompanying baggage, subject to conditions.



The order directed persons objecting to the Board's tentative findings and conclusions set forth in that order, or to the issuance of the proposed foreign air carrier permits, to file their objections within 21 days. In addition, the order provided that in the event no objections were filed, all further procedural steps would be considered waived, and the Secretary would enter an order which (1) would make final the Board's tentative findings and conclusions, and (2) subject to the disapproval of the President pursuant to section 801(a) of the Act, would issue the foreign air carrier permits to Wardair Canada (1975), Ltd. in the forms attached to the order.

No objections to Order 80-6-150 have been filed.

ACCORDINGLY,

1. We make final our tentative findings and conclusions set forth in Order 80-6-150;

2. We are issuing foreign air carrier permits in the forms attached to Wardair Canada (1975), Ltd.;

3. The authority granted in the attached permits to operate property charters shall be limited to planeload property charter until such time as the Board may amend Part 214 of its Economic Regulations to include the regulation of property charters;

4. Wardair Canada (1975), Ltd. will apply to the Director, Bureau of International Aviation for authorization to operate each flight or series of flights under the authority contained in paragraph D of the attached permit which grants, among others, circle tour and Fifth Freedom charter authority for a period of five years. The applications shall contain the information required on CAB Form 433, which may be used for this purpose. The requests for such authority must be received five business days before flight departure. Telephone applications may be permitted on less than five days notice and approvals granted verbally when special circumstances require this procedure;

5. The public interest requires that the exercise of the privileges granted by the attached permit which authorizes charter foreign air transportation between the United States and Canada for an indefinite period, should be subject to the terms, conditions, and limitations contained in the permit, to such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Board, and to the following condition:

> The holder shall not engage in the carriage of persons in foreign air transportation between the United States and Canada to or from a point in Ontario, west of a line drawn due north from Blind River, Ontario (46°11′ North Latitude, 82°58′ West Longitude) and extending to the border between Ontario and Manitoba, which is not a resort, camp, or outpost operated by a person duly licensed for such purpose by the Government of the Province of Ontario, nor the licensed base of a Canadian charter air carrier, nor a Canadian Customs port of entry; and is required on each flight out of the restricted area to make a stop at a Canadian Customs port of entry or at the licensed



> base of a Canadian charter air carrier where officers of the Ontario Ministry of Natural Resources may be available to make such inspection as they consider desirable; and shall have available on its aircraft for inspection by the U.S. authorities satisfactory evidence that it has complied with these conditions: *Provided*, however, that the above prohibition shall not apply to flights performed for purposes of medical evacuation, or other similar emergency situations; *provided* further that, when the circumstances warrant, the Board may, upon application by the holder, waive all or any part of these restrictions; and *provided* further that the holder shall clearly notify in writing all persons who contract for the holder's services of the limitations imposed on its operations;[1]

6. The Secretary of the Board shall sign the permits on our behalf and shall affix the seal of the Board;

7. Unless disapproved by the President of the United States under section 801(a) of the Act, this order and the permits attached shall become effective on the 61st day after their submission to the President,[2] or upon the date of receipt of advice from the President that he does not intend to disapprove the Board's order under this section, whichever is earlier; and

8. Wardair Canada (1975), Ltd. shall be a party to the rulemaking proceeding regarding insurance requirements in EDR-395, Docket 37531 and to the accompanying Show Cause Order 80-1-75, Docket 37532, 45 FR 7566 (February 4, 1980).

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[1] See Order 79-6-83, effective June 12, 1979.

[2] This order was submitted to the President on July 22, 1980. We received notification that the President did not intend to disapprove the board's Order on August 18, 1980.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Secretary

(SEAL)
All Members concurred.

Issued by
Order 80-8-97



# UNITED STATES OF AMERICA
# CIVIL AERONAUTICS BOARD
# WASHINGTON, D.C.

## PERMIT TO FOREIGN AIR CARRIER
## (as amended)

## WARDAIR CANADA (1975), LTD.

is authorized, subject to the following provisions, the provisions of the Federal Aviation Act of 1958, as amended, and the Board's orders, rules, and regulations, to engage in charter foreign air transportation, as follows:

Charter flights with respect to persons and their accompanying baggage, and property, between any point or points in Canada and any point or points in the United Statess.

The holder shall be authorized to perform those types of charters originating in Canada and in the United States, as are now, or may be, prescribed in Annex B of the Nonscheduled Air Services Agreement between the United States and Canada, signed May 8, 1974, including any amendments, supplements, reservations, or supersessions to that Agreement.

This permit shall be subject to the following terms, conditions and limitations:[1]

(1) The authority of the holder to perform United States-originating large aircraft charter flights shall be subject to the provisions of the Board's Regulations governing charters. The authority of the holder to perform

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[1] The exercise of the privileges granted by this permit is also subject to the conditions set forth in paragraph 5 of the order issuing this permit, which shall remain in effect until further order of the Board.

United States-originating small aircraft charter flights shall be limited to commercial air transportation of passengers and their accompanied baggage, and property, on a time, mileage or trip basis, where the entire planeload capacity of one or more aircraft has been engaged by a person for his own use or by a person for the transportation of a group of persons and/or their property, as agent or representative of such group.[2] The authority of the holder to perform Canadian-originating charter flights shall be subject to the Air Carrier Regulations of the Canadian Transport Commission. The holder shall, nevertheless, not be authorized to provide charters of a type other than as authorized by Annex B of the Nonscheduled Air Services Agreement between the United States and Canada, signed May 8, 1974, including any amendments, supplements, reservations or supersessions to that Agreement.

(2) The holder shall not engage in foreign air transportation between the United States and any point or points, other than a point or points in Canada, or transport any property or persons whose journey includes a prior, subsequent, or intervening movement by air (except for the movement of passengers independently of any group) to or from a point not in the United States or Canada:

---

[2] Annex A(I)(A) of the Nonscheduled Air Service Agreement between the United States and Canada, signed May 8, 1974, defines a "large aircraft" as an aircraft having both: (1) a maximum passenger capacity (as determined by Board Regulations) of more than 30 seats or a maximum payload capacity (as determined by Board Regulations) of more than 7,500 pounds; and (2) a maximum authorized takeoff weight on wheels (as determined by Canadian Transport Commission Regulations) greater than 35,000 pounds. A "small aircraft" is defined as an aircraft which is not a "large aircraft."



*Provided*, That the Board may, upon application by the holder, or by regulation, authorize the performance of charters where such movements are involved.

(3) The holder shall not perform United States-originating charter flights which at the end of any calendar quarter would result in the aggregate number of all United States-originating charter flights performed by the holder on or after May 8, 1974, exceeding by more than one-third the aggregate number of all Canadian-originating charter flights performed by the holder on or after May 8, 1974: *Provided*, That the Board may authorize the performance of charter flights not meeting the requirements set forth. For the purpose of making such computation the provisions of Annex A of the Nonscheduled Air Services Agreement between the United States and Canada, signed May 8, 1974, including any amendments, supplements, reservations or supersessions to that Agreement, shall apply.[3]

(4) The holder may grant stopover privileges at any point or points in the United States only to passengers (and their accompanied baggage) moving (a) on a Canadian-originating large aircraft flight operating under a contract for charter transportation to be provided solely by the holder (even if a different aircraft is used), or (b) on a Canadian-originating small aircraft flight operating under a contract for round-trip charter transportation to be provided solely by the holder and as to which the same

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[3] A charter shall be considered to originate in the United States (or Canada) if the passengers or property are first taken on board in that country, and shall be considered as one flight whether the charter be one-way, round-trip, circle tour, or open jaw, even if a separate contract is entered into for a return portion of the charter trip from Canada (or the United States).

aircraft stays with the passengers throughout the journey: *Provided*, That the Board ma authorize the performance of charters not meeting the requirements set forth.

(5) The Board, by order or regulation and without hearing, may require advance approval of individual charter trips conducted by the holder pursuant to the authority granted by this permit, if it finds such action to be required in the public interest.

(6) The holder shall conform to the airworthiness and airman competency requirements prescribed by the Government of Canada for Canadian international air service.

(7) This permit shall be subject to all applicable provisions of any treaty, convention, or agreement affecting international air transportation now in effect, or that may become effective during the period this permit remains in effect, to which the United States and Canada shall be parties.

(8) The holder shall keep on deposit with the Board a signed counterpart of CAB Agreement 18900, an agreement relating to liability limitations of the Warsaw Convention and the Hague Protocol approved by Board Order E-23680, May 13, 1966, and a signed counterpart of any amendment or amendments to such agreement which may be approved by the Board and to which the holder becomes a party.

(9) The holder (a) shall not provide foreign air transportation under this permit unless there is in effect third-party liability insurance in the amount of $1,000,000 or more to meet potential liability claims which may arise in connection with its operations under this permit, and unless there is on file with the Docket Section of the Board



a statement showing the name and address of the insurance carrier and the amounts and liability limits of the third-party liability insurance provided, and (b) shall not provide foreign air transportation with respect to persons unless there is in effect liability insurance sufficient to cover the obligations assumed in CAB Agreement 18900, and unless there is on file with the Docket Section of the Board a statement showing the name and address of the insurance carrier and the amounts and liability limits of the passenger liability insurance provided. Upon request, the Board may authorize the holder to supply the name and address of an insurance syndicate in lieu of the names and addresses of the member insurers.[4]

(10) By accepting this permit, the holder waives any right it may possess to assert any defense of sovereign immunity from suit in any action or proceeding instituted against the holder in any court or other tribunal in the United States (or its territories or possessions) based upon any claim arising out of operations by the holder under this permit.

(11) The exercise of the privileges granted by this permit shall be subject to such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Board.

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[4] By EDR-395, January 28, 1980, Docket 37531 and 37532, 45 FR 7566, February 4, 1980, and accompanying Show Cause Order 80-1-176, the Board proposed to adopt a new Part 205 of its Regulations to require $20,000,000 in third party liability insurance, with $300,000 per person passenger and third-party liability coverage, and to amend foreign air carrier permits to make them subject to the new regulations. The holder will be subject to the insurance requirements provided for in those regulations as they may be finally adopted.

This permit shall become effective on August 18, 1980. Unless otherwise terminated at an earlier date under the terms of any applicable treaty, convention, or agreement, this permit shall terminate (1) upon the effective date of any treaty, convention, or agreement, or amendment, which shall have the effect of eliminating the charter foreign air transportation authorized by this permit from the transportation which may be operated by carriers designated by the Government of Canada (or in the event of the elimination of any part of the charter foreign air transportation authorized, the authority granted shall terminate to the extent of such elimination); or (2) upon the effect date of any permit granted by the Board to any other carrier designated by the Government of Canada in lieu of the holder; or (3) upon the termination or expiration of the Nonscheduled Air Services Agreement between the United States and Canada, signed May 8, 1974; However, clause (3) of this paragraph shall not apply if, prior to the occurrence of the event specified in clause (3), the operation of the foreign air transportation authorized becomes the subject of any treaty, convention, or agreement to which the United States and Canada are or shall become parties.

The Civil Aeronautics Board, through its Secretary, has executed this permit and affixed its seal on July 18, 1980.

PHYLLIS T. KAYLOR
Secretary

(SEAL)

Issued by
Order 80-8-97



# UNITED STATES OF AMERICA CIVIL AERONAUTICS BOARD WASHINGTON, D.C.

## PERMIT TO FOREIGN AIR CARRIER (as amended)

## WARDAIR CANADA (1975), LTD.

is authorized, subject to the following provisions, the provisions of the Federal Aviation Act of 1958, as amended, and the Board's orders, rules, and regulations, to engage in charter foreign air transportation, as follows:

A. Circle tour charter flights of persons and their accompanying baggage which originate and terminate at a point or points in Canada and serve a point or points in the United States and a point or points in any country other than Canada and the United States.

B. Charter flights of persons and their accompanying baggage between a point or points in Austria, Belgium, Cyprus, Denmark, Finland, Federal Republic of Germany, France, Greece, Ireland, Italy, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, and Yugoslavia, and any point or points in the United States, limited to charter flights which originate in a named European country.

C. Circle tour charter flights of persons and their accompanying baggage which originate and terminate at the same point or points in Austria, Belgium, Cyprus, Denmark, Finland, Federal Republic of Germany, France, Greece, Ireland, Italy, Luxembourg, Malta, Nether-

lands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, and Yugoslavia, and serve a point or points in the United States and a point or points in any country other than a named European country and the United States.

D. Charter flights, other than those described in paragraphs, A, B, and C above, subject to prior Board approval.

This permit shall be subject to the following terms, conditions, and limitations:

(1) With respect to the authorization contained in paragraph A, the holder shall not engage in foreign air transportation between the United States and any point or points, other than a point or points in Canada, or transport any person whose journey, by any means of transportation, includes a prior, subsequent, or intervening movement to or from a point not in the United States or Canada: *Provided*, That this condition shall not prevent the holder, under the authorization contained in paragraph A, from serving a point or points in any foreign country between the point of origin and point of termination of the charter flight in Canada, or prevent the holder from carrying between a point or points in Canada and a point or points in the United States charter passengers originating in one of the European points named in paragraph C.

(2) With respect to the authorization contained in paragraph D, such flights must be individually approved by the Board unless this requirement is waived by Board order. Application shall be made as provided in the order issuing this permit or as required by subsequent Board order or regulation.



(3) The authority of the holder to perform circle tour charters originating in Canada shall be subject to the terms, conditions, and limitations contained in licenses issued by the Air Transport Committee of the Canadian Transport Commission authorizing the performance of such charters.

(4) The Board, by order or regulation and without hearing, may require advance approval of individual charter trips conducted by the holder pursuant to the authority granted by this permit, if it finds such action to be required in the public interest.

(5) The authority of the holder to exercise the privileges granted by this permit shall be subject to the provisions of Part 214 of the Board's Economic Regulations, other regulations of the Board governing tours or charters, and all amendments and revisions adopted by the Board.

(6) The holder shall conform to the airworthiness and airman competency requirements prescribed by the Government of Canada for Canadian international air service.

(7) The holder shall not operate any aircraft under the authority granted by this permit unless the holder complies with operational safety requirements at least equivalent to Annex 6 of the Chicago Convention.

The Civil Aeronautics Board, through its Secretary, has executed this permit and affixed its seal on July 18, 1980.

PHYLLIS T. KAYLOR
Secretary

(SEAL)

## Appendix J

United States Department of State Taxes
Washington, D.C. 20520
September 29, 1982

Mr. Randy Miller
Director
Department of Revenue
102 Carlton Building
Calhoun Street
Talahassee, Florida 32301

Dear Mr. Miller:

The Department of State is seeking your cooperation in an important matter affecting U.S. international aviation relations.

The U.S. Government exempts foreign airlines from customs duties, taxes, fees and other national charges on their aircraft, fuel, and aviation related materials. These exemptions include such items as lubricants, consumable technical supplies, spare parts (including engines) and aircraft stores (including food, beverages and tobacco). The United States obligation to accord these exemptions stems from our adherence to Article 24 of the International Convention on Civil Aviation (Chicago, 1944) and to the air transport agreements which the United States has with over 70 foreign countries. In some cases, such as the absence of a bilateral aviation agreement, exemptions are accorded foreign airlines pursuant to a finding of reciprocity.

Governments of a number of countries have recently brought to our attention that their airlines are required to pay state and local taxes on items for which the U.S. Government grants an exemption from federal taxes.



Some foreign governments have questioned the appropriateness of imposing these state and local taxes on foreign air carriers in view of the generally-accepted and long-standing international practice of reciprocally exempting such items from taxes. A few such governments have raised the possibility that state and local authorities in their jurisdictions could impose similar taxes on U.S. airlines. A proliferation of state and local taxes would frustrate the international system of reciprocal tax exemptions and thereby significantly increase the cost of international air transportation.

We urge, therefore, that you exempt foreign air carriers from taxes levied in your jurisdiction on items for which the U.S. Government provides an exemption. To ensure that U.S. airlines enjoy reciprocal treatment abroad, we recommend that you grant such exemptions only to foreign airlines which demonstrate that state and local authorities in their country exempt U.S. airlines from taxes.

In order to respond to foreign government inquiries, we would appreciate knowing precisely what state and local charges you currently levy on foreign airlines. Such information would be particularly helpful if you would indicate whether the charges are indeed taxes or whether they are fees for services rendered. Information concerning actual and proposed exemptions for foreign airlines would also be useful.

We appreciate your assistance and cooperation in this matter.

Sincerely,
MATTHEW V. SCOCOZZA
Deputy Assistant Secretary
for Transportation and

Telecommunication

cc: Mr. Grover C. Jones
Chief, Bureau of Aviation
Florida Dept. of Transportation
605 Suwannee St.
Mail Station 46
Talahassee, Florida 32301

Mr. Richard Judy
Director
Miami International Airport
Box 59-2075, AMF
Miami, Florida

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## Appendix K

STATE OF FLORIDA
DEPARTMENT OF REVENUE
TALLAHASSEE, 32301

October 25, 1982

Mr. Matthew V. Scocozza
Deputy Assistant Secretary
for Transportation and Telecommunication
United States Department of State
Washington, D. C. 20520

Dear Mr. Scocozza:

This will answer your letter of September 29 regarding taxation of foreign airlines.

The State of Florida recognized the importance of foreign airlines (and steamships) many years ago, and in spite of increased tax rates and bases over the years, the generous tax advantages allowed them have not changed.

Examples of these tax advantages are:

1. They are totally exempt from the state 8¢ motor fuel tax (the same as domestic commercial airlines) on all fuel placed aboard the aircraft.

2. The state's sales and use tax applies only to the ratio of miles flown in Florida to total system miles. The very short distance out of Miami, Ft. Lauderdale, Tampa and Jacksonville is so minute, and since we must recognize any tax properly imposed by another state or taxing jurisdiction, the result is that practically no Florida sales and use tax is realized from foreign carriers on their purchases of aircraft, parts, fuel, certain ground and loading equipment, etc.

This letter relates to state imposed taxes only. Any taxes and/or fees imposed by local taxing authorities are something we have very little knowledge of and no control over.

We are taking the liberty of forwarding a copy of your letter to Governor Bob Graham for review by his policy issue staff, and if there is some particular issue not covered in this response, please let us hear from you again.

Sincerely,
RANDY MILLER
Executive Director

RM/vam

cc: Honorable Bob Graham
Mr. Grover C. Jones
Mr. Richard Judy



## Appendix L

DEPARTMENT OF STATE
WASHINGTON, D.C. 20520
March 17, 1983

Mr. Randy Miller
Executive Director
Department of Revenue
State of Florida
Tallahassee, Fla. 23201

Dear Mr. Miller:

I am writing to you to express the Department of State's concern regarding the recent enactment of a state tax on aviation fuel. In your letter to me of October 25, 1982, you indicated that the State of Florida ". . . recognized the importance of foreign airlines many years ago . . . and that the generous tax advantages allowed them have not changed."

Therefore, we were surprised and distressed to hear that the State of Florida plans to impose a 5% tax on aviation fuel, effective April 1, 1983. I understand the tax is to be applied to all aviation fuel sold and not only to fuel consumed in Florida, as had previously been the case. If imposed, this tax will cause serious foreign relations problems unless provision is made to exclude foreign airlines. It may be possible, for example, to provide for an exemption based on reciprocity whereby foreign airlines would be exempted from the tax if U.S. airlines operating to the foreign airline's home country are also exempted from similar taxes.

We would appreciate any further information you can give us concerning this new tax and for your comments on my suggestion to avoid the foreign relations difficulties.

Sincerely,
MATTHEW V. SCOCOZZA
Deputy Assistant Secretary for
Transportation and Telecommunication

(1)

CASE NO. 84-902

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

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WARDAIR CANADA INC.,

Appellant,

vs.

STATE OF FLORIDA,
DEPARTMENT OF REVENUE,

Appellee.

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ON APPEAL FROM THE
SUPREME COURT OF FLORIDA

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# MOTION TO DISMISS OR AFFIRM

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Florida, Department
of Revenue

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

| CASES: | PAGE |
|---|---|
| Pennsylvania v. Nelson, 350 U.S. 497 (1956) | 35,36 |
| Republic of Finland v. Town of Pelham, 270 N.Y.S. 661 | 37 |
| Ryder Truck Rental v. Bryant, 170 So.2d 822 (Fla. 1964) | 3 |
| United States v. Pink, 305 U.S. 203 (1942) | 16 |

LAWS OF FLORIDA:

| | |
|---|---|
| Chapter 80-368, Laws of Fla. | 6 |
| Chapter 83-3, Laws of Fla. | 2,4,6,7,9,11, 31 |
| §61, Chapter 83-3, Laws of Fla. | 2 |

FLORIDA STATUTES:

| | |
|---|---|
| Chapter 206, F.S. | 3,4,5,7 |
| Chapter 207, F.S. | 3,4,5,7 |
| Chapter 212, F.S. | 2,3,4,6,8,9, 11 |

MOTION TO DISMISS OR AFFIRM

Appellee moves the Court to dismiss this appeal or to affirm the decision of the Supreme Court of Florida on the following grounds:

I. This appeal does not present a substantial federal question because all issues raised by the Appellant has been foreclosed by prior decisions of this Court.

II. The decision of the Supreme Court of Florida is consistent with prior decisions of this Court on the involved issues of law, many of which are cited in the Supreme Court's decision, and it is manifest that the questions on which the decision in this cause depends, are so insubstantial as not to need further argument.

## STATEMENT

This appeal is from a decision of the Florida Supreme Court upholding the constitutionality of Chapter 83-3, Laws of Florida, except for §61, which involved a Florida corporate tax credit, which is unrelated to the Florida Sales Tax Law, Chapter 212, Florida Statutes. Chapter 83-3, supra, amended Chapter 212, Florida Statutes, which is commonly referred to as the "Sales Tax Law of Florida". The statute, Chapter 212, Florida Statutes, has been construed by the Florida Supreme Court and other Florida appellate courts on numerous occasions, as being an excise tax levied on the privilege of engaging in certain businesses and transactions as provided for in the statute. Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950)



Florida Revenue Commission v. Maas Brothers, Inc., 226 So.2d 849 (Fla. 1 DCA 1969); cert. den. 237 So.2d 177; Estate of W. T. Grant Co. v. Lewis, 358 So.2d 76, (Fla.1 DCA 1978); 370 So.2d 764 (Fla.1979); Kirk v. Western Contracting Company, 216 So.2d 503 (Fla. 1 DCA 1968), cert. den. 225 So.2d 535; app. dism. 226 So.2d 815; Ryder Truck Rental v. Bryant, 170 So.2d 822 (Fla. 1964); Green v. Panama City Housing Authority, 115 So.2d 560 (Fla. 1959). The decision in this cause merely restates the position of the highest Court of the State of Florida, to the effect that the excise taxes imposed under Chapter 212, Florida Statutes, are imposed on the privilege of engaging in certain businesses, and are levied on the vendor, for the exercise of such privilege.

Motor fuel and special fuel are taxable under Chapters 212, 206, and 207, Florida Statutes. These several statutes generally interface to some extent because

the Legislature has attempted to utilize the same as part of the body of law of the State of Florida to generate taxes for the operation of government and taxes for public transportation. Prior to April 1, 1983, the effective date of Chapter 83-3, supra, motor fuel and special fuel which were not subject to the 8 cents tax imposed by Chapter 206, Florida Statutes, were taxable under the sales tax law, Chapter 212, Florida Statutes, in the following manner. §212.08(4), F.S., exempted motor fuels and special fuels on which a tax was imposed by Chapter 206 or Chapter 207, Florida Statutes. Aircraft was not within the definitions found in Chapters 206 or 207, Florida Statutes, and accordingly paid no tax under either Chapter 207, Florida Statutes, or Part I or Part II of Chapter



206, Florida Statutes. Truckers, as common carriers, did pay tax under Chapter 207, F.S., and paid tax under Chapter 206, F.S., although a credit was allowed on the taxes paid under Chapter 206, F.S., if tax was paid under Chapter 207, F.S. Truck common carriers were allowed to pro-rate tax under Chapter 207, Florida Statutes. See §207.005(2), F.S.

Since the airlines paid no tax under Chapters 206 or 207, F.S., the exemption found in §212.08(4), F.S., exempting purchases of fuels which had been subjected to tax under Chapters 206 and 207, F.S., did not apply to the airlines. However, airlines did receive pro-ration under §212.08(4), F.S.

Airlines generally lease space and the right to use government owned airport facilities in Florida and at one time were required to pay ad valorem real property taxes on such use and occupancy. However, the Legislature in 1980 enacted Chapter 80-368, Laws of Florida, so as to relieve airlines from the burden of having to pay local ad valorem taxes on such leased property used for airline purposes.

Prior to the effective date of Chapter 83-3, supra, vessels and railroads, like aircraft, were allowed to pro-rate the tax by virtue of the provisions found in Chapter 212, Florida Statutes. See §212.08(4), §212.08(8), and §212.08(9), F.S. However, vessels and railroads were



not exempt from the provisions of Part I of Chapter 206, F.S., on purchases of motor fuel, but were exempt as were aircraft from the provisions of Part II of Chapter 206, F.S., and Chapter 207, F.S., both of which contained taxes on such fuel in a specified amount per gallon. Chapter 83-3, supra, removed from the statute, the authority which allowed airlines to pro-rate taxes. Truck line common carriers were required to pay both the taxes imposed under Chapter 206, F.S., and any which may be due under Chapter 207, F.S., and the new tax imposed in Part II of Chapter 212, Florida Statutes, through the enaction of Chapter 83-3, supra. Vessels and railroads continue to receive the pro-ration found in

§212.08(4), F.S., but also continue to be liable for taxes imposed under Part I of Chapter 206, F.S.

Although Appellant argues strenuously that the tax imposed under Chapter 212, Florida Statutes, is a user fee or user tax, this contention was rejected by the Trial Court both factually and legally. Although the Appellee does not agree that such question is a factual issue, and in fact, in another case pending on appeal involving the same statute,[1] no testimony was taken, even if such were a factual issue, it has been resolved against

[1] Northeastern Airways, Inc., and Arrow Air, Inc., v. State of Florida, Department of Revenue Case No. 84-929



the Appellant, by the Trial Court which is the trier of fact, and affirmed by the Florida Supreme Court.

The Appellant's argument premised in part on the false assumption that the taxes imposed under Chapter 212, Florida Statutes, are user fees. This is not, and never has been true.

It is significant that all foreign air carriers and all United States air carriers purchasing fuel in the United States were subjected to taxes in exactly the same manner both before and after the enaction of Chapter 83-3, Laws of Florida.

The agreement between the United States and Canada, upon which Appellant relies, provides in part:

> 2. Neither Contracting Party shall give a preference to its own carriers over the carriers of the other Contracting Party in the application of its customs, immigration, quarantine,

> and similar regulations or in the use of airports, airways, and other facilities under its control.
>
> . . .
>
> Neither Contracting party shall discriminate against a carrier or among carriers of the other Contracting Party providing the services covered by this Agreement.

Non Scheduled Air Service Agreement, U.S. - Canada, Articles XIII and XIV, T.I.A.S. 7826.

Article XII of said agreement provides:

> Each Contracting Party shall exempt the carriers of the other Contracting Party to the fullest extent possible under its national law from import restrictions customs, duties, excise taxes, inspection fees, and other national duties and charges on fuels, lubricants, consumable technical supplies . . .

Non Scheduled Air Service Agreement U.S. - Canada, Article II, Paragraph 1, T.I.A.S. 7826.

No specific exemption is provided in any of the international agreements for state excise taxes such as that imposed



under Chapter 212, Florida Statutes, as amended by Chapter 83-3, Laws of Florida.

## POINTS I AND II

POINT I. THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION BECAUSE ALL ISSUES RAISED BY THE APPELLANT HAVE BEEN FORECLOSED BY PRIOR DECISIONS OF THIS COURT.

POINT II. THE DECISION OF THE SUPREME COURT OF FLORIDA IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT ON THE INVOLVED ISSUES OF LAW, MANY OF WHICH ARE CITED IN THE SUPREME COURT'S DECISION, AND IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION IN THIS CAUSE DEPENDS, ARE SO INSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

### A. THE FLORIDA SUPREME COURT'S DECISION IS CONSISTENT WITH THIS COURT'S DECISION IN JAPAN LINE LTD. V. COUNTY OF LOS ANGELES. 441 U.S. 434 (1979).

It should be remembered that the exemption sought by foreign airlines is inconsistent with the Articles in the

agreement which provide that neither party shall discriminate against a carrier or among carriers of the other Contracting Party providing the services covered by the agreement, and which provide that neither Contracting Party shall give a preference to its own carriers over the carriers of the other Contracting Party. Thus, that which is sought by the Appellant would effectively destroy this competitive equality because it would provide an exemption from state taxation to the Appellant while purchasing fuel in the United States, which such exemption is not permitted to United States domestic airlines purchasing fuel in Florida traveling and competing on the same routes as the foreign airlines. The effect of this is to have Florida and the United States subsidizing foreign airlines in competition with domestic airlines. Thus the



discriminatory practice sought by the Appellant is totally inconsistent with the terms of the agreement itself, which in effect seek as a goal nondiscriminatory practices and action against the airlines of the other Contracting Party. It is also inconsistent with the goal announced in the Preamble of the Agreement of desiring to insure continued development of a system of air transport free from discriminatory practices. (See Non-Scheduled Air Services Agreement, May 8, 1974, T.I.A.S. 7826 and the previously quoted provisions of the agreement.) So it is not freedom from discrimination in taxing practices which is sought by the Appellant, but is instead in fact, a competitive advantage which is sought, which would allow the Appellant to be free from taxes which would be imposed

upon dealers selling fuel to United States airlines in the State of Florida. So that which is sought by the foreign airlines is a competitive advantage, not equality of treatment in competition.

Although the provisions in the Agreement relating to discrimination do not specifically speak to taxes, by their terms, these clauses suggest a purpose of guaranteeing a fair and equal opportunity to operate and compete over the designated routes. The State Department's official Digest of International Law, 9 Whiteman Digest of International Law, 457-58 (1968) suggests that the goal of these provisions was to avoid subsidization of one airline more than another so that one carrier could give the same service at a lower rate. However, even assuming that the fair and



equal opportunity to operate provisions do relate to taxes, it is obvious that Florida's excise tax levied on the sale of fuel in the State of Florida, is consistent with these international agreement provisions because it taxes foreign airlines and domestic airlines identically. This Court has recognized that the language of a Treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them. Guarantee Trust Co. v. United States, 304 U.S. 126 (1938), in Estate of Ghio, 108 P. 516 (Calif. 1910), aff'd. Rocco v. Thompson, 223 U.S. 317 (1912) in which

the Court stated that:

> "Such intent is not to be lightly imputed to the federal government, and that it cannot be allowed to exist except where the language used in a treaty plainly expresses it, or necessarily implies it. . ."

It has also been recognized that even treaties with foreign nations will be carefully construed so as not to derogate from the authority and states of this nation unless clearly necessary to effectuate the national policy. United States v. Pink. 305 U.S. 203 (1942).

In Hines v. Davidowitz, 312 U.S. 52 (1941), this Court discussed state laws which were conflicting, contrary to, or repugnant to federal law in the context of a state law dealing with regulation of aliens, which it was conceded was a matter



exclusively with the Federal Government's jurisdiction. This Court pointed out, however, that concurrent state laws could not be enacted dealing with the same general subject, but distinguished that fact situation from the situation where the states' sovereign power to tax was involved and stated:

> Any concurrent state power that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as is its power to tax. And it is also of importance that this legislation deals with the rights, liberties, and personal freedoms of human beings, and is in an entirely different category from state tax statutes or state pure food laws regulating the labels on cans.

312 U.S. at page 58.

The footnote found therein is also significant. It provides:

> Express recognition of the breadth of the concurrent taxing power of state and nation is found in Federalist paper No. 32.

With this general understanding of certain provisions found in the agreement and of the general power of states to tax absent express and clear restriction by the federal government, Appellant's contention that the Supreme Court's decision is inconsistent with Japan Line will be considered.

First, it should be pointed out that Appellant's statement that fuel should be likened to the containers involved in Japan Line is incorrect. The containers in Japan Line were in fact instrumentalities used for shipping property into the United States. The containers would be likened to the aircraft themselves and not to the fuel which is consumed by the aircraft in flying into the United States. Thus, the Appellant's statement that the fuel is an instrumentality of commerce is totally false



and incorrect. Furthermore, the Appellant is incorrect in stating that Florida imposes a tax on aviation fuel. This is not true. Florida's tax is an excise tax imposed upon the privilege of engaging in the business of selling tangible personal property which includes fuel. The excise tax is imposed on the vendor or dealer and is a privilege tax not a property tax as suggested by the Appellant, and which was before this Court in Japan Line. Florida's excise tax on the privilege of engaging in business, is totally dissimilar from the ad valorem property tax imposed on the property itself, in that case, the containers. Understandably, the Appellant is trying to change the nature of the Florida tax so as to support an argument that the Florida Supreme Court's decision is inconsistent with the Japan Line. There is no com-

parison; in Japan Line the tax was a personal property tax levied on the containers which were temporarily within the United States in California. The containers were owned by nationals in Japan and were taxed in Japan through the levy of an unapportioned property tax. Florida is not taxing the fuel even if it were an instrument of commerce, which it is not. The fuel which is sold which gives rise to the excise tax levied under Florida law is fuel owned by United States businesses, physically located in Florida, whose taxable event or incident occurs on the first sale or transfer or withdrawal from storage which is also within the State of Florida. That same fuel could not be withdrawn from storage for use in any other foreign country.



In Japan Line, this Court set forth two additional requirements to the "four prong" test referred to in Complete Auto Transit v. Brady, 430 U.S. 274 (1977). The first was whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and second whether the tax prevents the federal government from "speaking with one voice when regulating commercial regulations with foreign governments." The decision of the Florida Supreme Court is consistent with Japan Line and meets both of the additional tests. First, since the legal incident of the withdrawal from storage for use can occur only once, that legal incident could not be taxed in any foreign country. This situation is totally dif-

ferent from the factual situation before this Court in Japan Line, because in that case, the containers being taxed were taxed because of their physical location in California, even though such physical location was of a temporary nature. The containers were used to transport merchandise and could be compared to vessels used for the transportation of property from a foreign country to the United States. The containers had entered the United States pursuant to a Customs Convention on containers which granted containers temporary admission free of import duties and import taxes and free of import prohibitions and restrictions provided they are used solely in foreign



commerce and are subject to reexportation. The containers were designated "instruments of international traffic". Since the containers were capable of physical relocation, and in fact were physically relocated periodically as instrumentalities transporting property in foreign commerce, such containers could physically be located in some other country, and since the tax imposed was a personal property tax which turned on the situs of the personal property, it is readily apparent that multiple taxation could easily occur. Thus, the tax imposed in Japan Line was a state tax on instrumentalities of foreign commerce, which is totally unlike the tax imposed in the case at bar, which is an excise tax imposed on dealers for the privilege of engaging in the business of

selling fuel in the United States whose legal incident is on the withdrawal from storage for use. This can only occur once, and that is in the State of Florida. Furthermore, in Japan Line, it was established that Japan has the right and the power to tax the containers in full, and in fact did tax such containers under the property tax law in Japan. So, because the legal incident giving rise to the tax was physical situs, multiple taxation in fact did occur.

Appellant's suggestion that a risk of double taxation is sufficient to invalidate the tax simply is not supported by Japan Line. Furthermore, Appellant's speculation that after the airplane lands in a foreign country, the foreign country may impose a tax on whatever fuel is left in the tanks of the aircraft upon landing is exactly that; pure speculation.



Furthermore, the State of Florida does not attempt to tax any fuel retained on board the airlines upon arrival into the State of Florida. Thus, the multiple taxation in fact which existed in Japan Line is not present in the case at bar. Thus, the Florida Supreme Court's decision is consistent with this Court's pronouncement in Japan Line in this regard.

Japan Line was discussed by this Court in Container Corp. of America v. Franchise Tax Board, 463 U.S. 159 (1983). In discussing Japan Line, this Court pointed out that in that case California had levied an apportioned, non-discriminatory, ad valorem property tax on cargo containers which were instrumentalities of foreign commerce and which were temporarily located in various ports. This Court pointed out that the same cargo containers were subject to an unapportioned property tax in their home

port of Japan. It also recognized that a convention agreement signed by the United States and Japan made clear at least that neither national government could impose a tax on temporarily imported cargo containers whose home port was in the other nation. This Court emphasized that the tax fell on an instrumentality of commerce, which was temporarily domiciled abroad; that is, the containers themselves. This Court in Container Corp. then stated that " . . . on the basis of the facts in Japan Line, we concluded that the California tax at issue was constitutionally proper. . ."

This Court in Container then distinguished the situation in Container from that in Japan Line by pointing out (1) that it involves a tax on income rather than a tax on property, (2) the reasons for allocation to a single situs that often apply in the case of property taxation carry little



force in the case of income taxation; (3) double taxation in the Container Corp. case, although real, was not the "inevitable" result of the California taxing scheme. This Court pointed out that in Japan Line, it had relied strongly on the fact that one taxing jurisdiction claimed the right to tax the containers value in full and another taxing jurisdiction claimed the right to tax the same containers in part, which was a combination resulting necessarily in double taxation. Furthermore, this Court recognized that the terms of the treaties involved in Container Corp. did not include taxing activities of sub-national governmental units such as states, stating:

> Third, None of the tax treaties into which the United States has entered covers the taxing activities of sub-national units such as states.

It pointed out that the Senate had on at least one occasion, considering a proposed treaty, declined to give its consent to a provision in the treaty so as to

include a restriction on state taxation. This is significant because the agreement involved in the case does not cover the taxing activities of sub-national units such as states. Thus, the Florida Supreme Court's decision is consistent with this Court's decision in Container Corp. because it too recognized that the agreement relied upon as a basis for avoiding state taxation only spoke to national taxes and not state taxes. Thus, this Court upheld the imposition of the California income tax distinguishing that situation from the situation involving the property tax on containers involved in Japan Line.

Florida's tax is an excise tax imposed on Florida dealers for the privilege of engaging in the business of selling fuel. This privilege is exercised solely within



the State of Florida and applies to all airlines, foreign and domestic, purchasing fuel in the State of Florida. The legal incidence of levy is the first withdrawal for use, and this can occur only once. Florida is not attempting to tax fuel brought into the United States aboard foreign airlines coming into Florida. Since this legal incident can occur only once, no multiple taxation in fact could exist. This is totally dissimilar from the situation in Japan Line where the containers were subject to both property tax in California and an unapportioned like tax in Japan. Thus, the Florida Court's decision is consistent with this Court's decisions in Container Corp. and Japan

Line.

B. THE AIR TRANSPORT INTERNATIONAL AGREEMENT DOES NOT EXEMPT FOREIGN AIRLINES FROM IMPOSITION OF A STATE EXCISE TAX ON THE PURCHASE OF FUELS IN A STATE OF THE UNITED STATES.

Appellant apparently acknowledges that none of the agreements provide for the specific exemption which it seeks but nevertheless suggests that somehow Florida's excise tax prevents the United States from speaking with one voice. The United States has spoken and has not chosen to exempt foreign airlines from state excise taxes imposed on purchases of fuel in any state in the United States. One reason for this is obvious. The purpose of the international agreement is to ensure competitive equality. If the United States



had exempted foreign airlines from imposition of state excise taxes, this could mean that the state would still impose taxes on sales to domestic airlines on such purchases of fuel, but could not collect a similar tax on sales to foreign airlines competing with the domestic airlines over the same routes. This would destroy the competitive equality demanded by the agreements and would leave the United States in the position of subsidizing foreign airlines at the expense of the domestic carriers. Furthermore, prior to April 1, 1983, when Chapter 83-3, Laws of Florida, was enacted, foreign airlines and domestic airlines were required to pay the excise tax imposed on fuel sold in Florida, and such tax was

apportioned. If the agreement exempted foreign airlines from the purchases of fuel since the inception, (the 1940's) then why were the foreign airlines paying the tax prior to April 1, 1983?

The Appellant attempts to rewrite the agreement to provide for a specific exemption from state taxation. None of the agreements contain such an exemption so the statement made by Appellant that the Florida Supreme Court ignored the terms of the agreement is totally without basis. The Florida Supreme Court did not ignore the terms of the agreement and in fact examined same and recognized that no specific exemption from state excise taxes was provided for in such agreements.



By limiting the self-executing provisions pertaining to taxes in the agreements to only national taxes and duties, the Executive Branch has indicated an intent not to invade the state's power to tax (some agreements do not even speak to any taxation). Federal preemption of state taxation should never be implied nor inferred, so the absence of any specific preemption of the state's power to tax would certainly suggest that no intent existed to invade the state's taxing power.

The Florida Supreme Court squarely recognized that there was no statutory provision found in the Appellant's involved agreement which provided for exemption from state excise taxes. Article XII of the agreement only speaks to national duties and charges on fuel.

The agreement has spoken with one voice and has chosen to remain silent on the subject of state excise taxes, no doubt recognizing the state's sovereign power to tax, thus, the agreements have not preempted the taxing power. As this Court knows from the companion cases involving foreign airlines which are also being appealed to this Court, some of the agreements speak to the United States using its best efforts to secure an exemption from state taxes, but this too would fall far short of declaring a national policy of preempting state taxation.[1]

The language of a treaty wherever reasonable possible will be construed so as not to override state laws or to impair rights arising under them Guarantee Trust Co. v. United States, 304 U.S. 126 (1938).

[1]Air Jamaica Limited, et al. v. State of Florida, Department of Revenue, Case No. 84-1041; Lineas Aereas Costarricenses, S.A., et al. v. State of Florida, Department of Revenue, Case No. 84-922.



The Florida Supreme Court recognized that the provision in the agreement dealing with national duties and excise taxes applied only to national customs duties and excise taxes and charges. The Florida Supreme Court recognized that the purpose of the agreement was to preserve and promote the continued development of a system of air transport free from discriminatory practices and to support equal commercial opportunity between the nations. It pointed out that the competitive equality would be destroyed if the United States air carriers had to pay state excise taxes on fuel purchases and the foreign carriers did not. In doing so, the Florida Supreme Court relied upon this Court's decision in Pennsylvania v. Nelson, 350 U.S. 497 (1956) and applied the three-prong test to determine the supremacy of a federal regulatory scheme over the state

regulation in the same or similar area. Thus, the Florida Supreme Court's decision is consistent with (1) the language of the various agreements themselves, and (2) this Court's application of the three-prong test in Nelson.

Any examination of federal restriction on state taxing power must be viewed in light of this Court's statement in Hines v. Davidowitz, 312 U.S. 52 (1941). That case discussed the concurrent powers of the state and recognized that the state's power to tax was bottomed on a much broader base than that being considered in Hines. The case at bar is not a situation where federal preemption exists because the agreement speaks only to national taxes and not to state taxes. The language in the agreement is totally dissimilar from the language in the treaty provision in the



case of Republic of Finland v. Town of Pelham, 270 N.Y.S. 661, in which Article 21 of the treaty provided:

> "Lands and buildings situated in the territory of either High Contracting Party, of which the other High Contracting Party is the legal or equitable owner and which are used exclusively for governmental purposes by that owner, shall be exempt from taxation of every kind, National, State, Provincial and Municipal, other than assessments levied for services or local public improvements by which the premises are benefited." (49 U.S. Stat. 2675) (e.s.)

The Executive Branch of the Federal Government has spoken only to national taxes. The Appellant is asking this Court to ignore this and in effect, asking this Court to amend or rewrite the agreements to include an exemption from state excise taxes.

Accordingly, the federal questions presented are plainly insubstantial and it is manifest that the questions on which the decision in this Cause depends are so insubstantial as not to need further argument.

## CONCLUSION

For all of the above and foregoing reasons, the Appellee urges the Court to grants its Motion to Dismiss the appeal or to affirm the decision of the Supreme Court of Florida, because this appeal does not present a substantial federal question inasmuch as the decision of the Supreme Court of Florida is consistent with prior decisions of this Court, and it is manifest that the questions on which the decision in this Cause depends are so insubstantial as not to need further argument.

Respectfully submitted,

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## PROOF OF SERVICE

I, LARRY E. LEVY, depose and say that I am Counsel of Record for Appellee, State of Florida, Department of Revenue, and that on February 1, 1985, I served a copy of the foregoing Motion to Dismiss or Affirm on each of the parties required to be served herein as follows:

On Appellant, WARDAIR CANADA, INC., by mailing copies in duly addressed envelopes, with first class postage prepaid, to Walter D. Hansen, Burwell, Hansen, Manley & Peters, 1706 New Hampshire Avenue, N.W., Washington, D.C. 20009.

All parties required to be served have been served.

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3 4 4

Nos. 84-902, 84-922 and 84-1041

# In the Supreme Court of the United States

OCTOBER TERM, 1985

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WARDAIR CANADA INC., APPELLANT

*v.*

FLORIDA DEPARTMENT OF REVENUE

---

LINEAS AEREAS COSTARRICENSES, S.A.,
ET AL., APPELLANTS

*v.*

FLORIDA DEPARTMENT OF REVENUE

---

AIR JAMAICA LIMITED, ET AL., APPELLANTS

*v.*

FLORIDA DEPARTMENT OF REVENUE

---

*ON APPEAL FROM
THE SUPREME COURT OF FLORIDA*

---

**BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE**

---



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103 pp

## QUESTION PRESENTED

Whether a Florida sales tax on aviation fuel, as applied to fuel purchased by foreign airlines for use exclusively in international traffic, unconstitutionally impairs the power of the federal government to regulate foreign commerce.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

# In the Supreme Court of the United States

OCTOBER TERM, 1985

---

No. 84-902

WARDAIR CANADA INC., APPELLANT

*v.*

FLORIDA DEPARTMENT OF REVENUE

---

No. 84-922

LINEAS AEREAS COSTARRICENSES, S.A.,
ET AL., APPELLANTS

*v.*

FLORIDA DEPARTMENT OF REVENUE

---

No. 84-1041

AIR JAMAICA LIMITED, ET AL., APPELLANTS

*v.*

FLORIDA DEPARTMENT OF REVENUE

---

*ON APPEAL FROM*
*THE SUPREME COURT OF FLORIDA*

---

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

**OPINIONS BELOW**

The opinion of the Florida Supreme Court in No. 84-902 (J.S. App. A1-A7) is reported at 455 So. 2d 326. The opinion of the Florida Supreme Court in No. 84-922 (J.S. App. 1a-2a) is unreported. The opinion of the Florida Supreme Court in No. 84-1041 (J.S. App. 28-30) is reported at 455 So. 2d 324. The opinions of the

Leon County Circuit Court (84-902 J.S. App. A21-A24; 84-922 J.S. App. 38a-50a; 84-1041 J.S. App. 31-36) are unreported.

## JURISDICTION

The judgment of the Florida Supreme Court was entered in each case on June 14, 1984. Timely motions for rehearing were denied in each case on September 12, 1984 (84-902 J.S. App. A38; 84-922 J.S. App. 71a; 84-1041 J.S. App. 95). Notices of appeal in the Florida Supreme Court were filed respectively on November 15, 1984 (84-902 J.S. App. A39-A41), on November 14, 1984 (84-922 J.S. App. 73a-75a), and on November 28, 1984 (84-1041 J.S. App. 98-100). The jurisdictional statement in No. 84-902 was filed on December 5, 1984, and the jurisdictional statements in Nos. 84-922 and 84-1041 were filed on December 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2). Review lies by way of appeal where, as here, a state court has held a state tax statute applicable to a particular set of facts as against the contention that such application is invalid on federal grounds. *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434, 441 (1979).

## STATEMENT

1. Appellants in these three cases are 19 airlines established under the laws of foreign countries and having their principal places of business outside the United States. The nations in which they are domiciled are located in North America (Canada and Mexico), Central America (Costa Rica, El Salvador and Honduras), South America (Argentina, Brazil, Colombia, Ecuador, Guyana and Peru), and the Caribbean (Barbados, Jamaica, and Trinidad & Tobago). Each appellant has been found by the Civil Aeronautics Board to be owned and effectively controlled by the government or nationals of its home country. About half the appellant airlines



are wholly owned[1] or substantially owned[2] by the governments of the nations in which they are domiciled.

Each appellant has been designated by its home country to provide international air transportation to and from the United States. Aviation relations between the United States and appellants' home countries are governed inter alia by a multilateral aviation agreement commonly known as the Chicago Convention (Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, 61 Stat. 1180 *et seq.* ). In addition, all of the appellants' home countries, except Honduras, have entered into bilateral executive agreements with the United States respecting air transportation services.[3] Pursuant to these agreements (or, in the case of Honduras, pursuant to CAB authorization (84-922 J.S. App. 43a)), appellants fly only on routes between their home countries and specified cities, called "gateways," in the United States (*ibid.*). Appellants engage in no intrastate or interstate flights within this country, and

[1] Aerolineas Argentinas, for example, is 100% owned by the Government of Argentina, Aeromexico by the Government of Mexico, Ecuatoriana by the Government of Ecuador, BWIA International by the Government of Trinidad & Tobago, and Varig by the Government of Brazil (84-922 J.S. App. 76a-79a).

[2] Mexicana, for example, is substantially owned by the Government of Mexico, Air Jamaica by the Government of Jamaica, Caribbean Air Cargo by the Government of Barbados, and Guyana Airways by the Government of Guyana (84-922 J.S. App. 77a; 84-1041 J.S. 17).

[3] After the Florida trial court entered judgment in these cases, the bilateral aviation agreements with three of appellants' home countries—Argentina, Brazil, and Peru—terminated. Negotiations toward new agreements have commenced, and it is not expected that the tax provisions of the new agreements, if any, will differ appreciably from those of their predecessors. For the sake of simplicity, we will in this brief generally refer to the relevant provisions of the bilateral agreements as they existed when the trial court rendered its decisions.

their operations here are thus exclusively in foreign commerce. See 49 U.S.C. App. 1508(b).

Each appellant operates to and from Miami, Florida, which is the primary domestic gateway for flights between the United States and South America, Central America, and the Caribbean, as well as a major stop for flights between this country and Europe. Appellants regularly purchase significant quantities of aviation jet fuel at Miami International Airport. This fuel is not purchased for export, but is consumed by appellants' airplanes in international commerce en route from Miami. Appellants are exempt from federal taxes on this aviation fuel by virtue of explicit provisions in the bilateral aviation agreements between the United States and their home countries, or, absent such provisions, by virtue of reciprocal tax exemptions provided to American carriers by appellants' home country governments.

2. For many years, Florida has imposed a sales tax on fuel purchased by common carriers, including airlines, within that State. This levy is an excise tax, not a user fee (84-922 J.S. App. 52a). The tax is technically imposed on the fuel supplier, but the supplier is required to pass the tax on to the purchaser (Fla. Stat. Ann. § 212.62(2) (West Supp. 1985)). Thus, the carrier bears the economic incidence of the tax.

Prior to April 1, 1983, Florida's sales tax on fuel, as it applied to all carriers, was prorated on a mileage basis. That is, a carrier paid only that portion of the otherwise-payable tax that represented the ratio of its Florida mileage to its worldwide mileage for the previous fiscal year. Fla. Stat. Ann. § 212.08(4) (West 1971). The Florida Supreme Court stated some years ago that this proration formula was designed "to prevent the State from exceeding its powers to tax interstate and foreign commerce" by ensuring that "Florida would only tax that portion of commerce activity that occurred within



the State." *Tropical Shipping & Construction Co.* v. *Askew*, 364 So. 2d 433, 435 (1978). Because appellants, following normal airline routes, travel only briefly in Florida air space, they and other foreign airlines paid little or no Florida fuel tax prior to April 1, 1983 (84-922 J.S. 3).

Effective April 1, 1983, the Florida Legislature substantially amended its fuel tax regime. The amendment most pertinent here was that repealing the mileage proration formula for airlines, while leaving it in effect for railroads engaged in interstate commerce and for vessels engaged in interstate or foreign commerce. Fla. Stat. Ann. § 212.08(4)(a)(2) (West Supp. 1985). As a result, airlines, including foreign airlines like appellants, are now taxed on all aviation fuel they purchase in Florida, even though that fuel is used exclusively in foreign commerce (84-922 J.S. App. 53a).[4]

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[4] Florida recently enacted, effective July 1, 1985, further amendments to its scheme of aviation fuel taxation. 1985 Fla. Laws 85-348, § 9. While exempting aviation fuel from sales tax, those amendments impose a new excise tax specifically on aviation fuel. *Id.* §§ 2, 3. The amount of the levy (5.7 cents per gallon) is virtually the same as under the version of the law here challenged (5% of a deemed price of $1.148 per gallon). Compare 1985 Fla. Laws 85-348, § 2, with Fla. Stat. Ann. § 212.62(3)(c) (West Supp. 1985). However, rather than applying (as did the sales tax) only to aviation fuel purchased in Florida (see Fla. Stat. Ann. § 212.08(4)(a)(2) (West Supp. 1985)), the new excise tax applies to "aviation fuel sold in this state, *or brought into this state for use*" (1985 Fla. Laws 85-348, § 2 (to be codified at Fla. Stat. § 206.9825) (emphasis added)). A refund of the new excise tax is to be allowed "not [to] exceed six-tenths of one percent of the wages paid by the carrier to employees located or based within this state" (1985 Fla. Laws 85-348, § 2 (to be codified at Fla. Stat. § 206.9855)). This refund provision, of course, will provide virtually no tax relief to foreign airlines like appellants, which typically have few if any employees based in Florida. Enactment of these amendments, which apply only prospectively (1985 Fla. Laws 85-348, § 9)), does not moot the instant appeals, which continue to present a live controversy concerning appellants' sales tax liability from April 1, 1983, to July 1, 1985.

3. Appellants brought these actions in the Leon County Circuit Court seeking declaratory and injunctive relief against the application of Florida's sales tax to them. Their principal contention was that the tax, as applied to aviation fuel used by foreign airlines in foreign commerce, is inconsistent with federal aviation policy, particularly as that policy is expressed in multinational and bilateral agreements executed by the United States and appellants' home countries. Appellants accordingly contended that Florida's tax, as applied, is unconstitutional under the Supremacy Clause and the Foreign Commerce Clause. See *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434 (1979).[5]

The circuit court did not explicitly declare Florida's aviation fuel tax unconstitutional. See 84-902 J.S. App. A23-A24; 84-922 J.S. App. 47a-48a; 84-1041 J.S. App. 35-36. However, the court found that the tax, as applied to appellants, was "inconsistent with the undertakings of the United States government in [its] international bilateral agreements," and it accordingly "recognize[d] an exemption from the fuel tax for [those] foreign

[5] A number of domestic airlines likewise brought suits challenging Florida's sales tax on aviation fuel, predicating their challenges chiefly on the Due Process Clause, the Equal Protection Clause, and the Interstate Commerce Clause. The Florida courts largely rejected those challenges, and appeals raising those questions are now pending in this Court. *Northeastern International Airways, Inc. & Arrow Air, Inc.* v. *Florida Department of Revenue,* No. 84-921; *Eastern Airlines Inc.* v. *Florida Department of Revenue,* No. 84-926; *Delta Airlines, Inc.* v. *Florida Department of Revenue,* No. 84-929. The Court has invited our views in those cases, and a brief expressing those views is being filed contemporaneously herewith. To the extent that the foreign airlines in the instant appeals replicate arguments made by the domestic airlines—arguments that the Florida courts rejected, relying on the decisions mentioned above (84-902 J.S. App. A2, A23; 84-922 J.S. App. 2a, 39a; 84-1041 J.S. App. 2, 28-29, 32)—we address those arguments in our other brief.



airlines whose governments have entered into executive agreements with the United States * * * or who have been granted Foreign Air Carrier Permits by the United States on a basis of reciprocity and comity" (84-922 J.S. App. 48a, 49a-50a; see 84-902 J.S. App. A23-A24; 84-1041 J.S. App. 36). On that basis, the court granted appellants "a permanent injunction against [the Florida] Department of Revenue from assessing and collecting fuel taxes pursuant to" the challenged statute (84-1041 J.S. App. 36; see 84-902 J.S. App. A22; 84-922 J.S. App. 48a).

The court recognized that this Nation's bilateral aviation agreements, negotiated at various times over a 40-year period, deal with fuel taxes under somewhat differing rubrics, and that none of those agreements explicitly interdicts state or local, as opposed to "national" (viz., federal), taxes on aviation fuel. See 84-902 J.S. App. A23; 84-922 J.S. App. 41a; 84-1041 J.S. App. 33-34. At the same time, however, the court recognized that those agreements evidence a well-settled federal policy favoring "reciprocal tax exemptions" (84-922 J.S. App. 44a), a policy "designed to establish federal uniformity and prevent retaliatory taxes on U.S. carriers," and, by "prevent[ing] any discrimination, * * * to further the free flow of international aviation" (84-902 J.S. App. A22, A23). The court noted that " 'the Federal Government must speak with one voice when regulating commercial relations with foreign governments' " (84-922 J.S. App. 47a, quoting *Japan Line,* 441 U.S. at 449), and that federal aviation authorities over the years have consistently endeavored to persuade foreign nations to eliminate aviation fuel taxes on the basis of reciprocity (84-922 J.S. App. 46a). "[A]llowing the fifty states to impose individual state taxes," the court concluded, "would thwart the purpose of these federal efforts and infringe on the federal power to regulate foreign commerce" (*ibid.* ).

Upon cross-appeals from the circuit court's judgments, the intermediate appellate court certified the cases directly to the Florida Supreme Court (84-922 J.S. App. 37a), which, in a divided opinion, "reverse[d] the circuit court's order to the extent that it recognized an exemption from the excise tax for the foreign airlines" (*id.* at 2a; 84-902 J.S. App. A6; 84-1041 J.S. App. 30). The Florida Supreme Court initially rejected appellants' argument, based on the Supremacy Clause, that Florida's tax was preempted by the federal bilateral agreements. The court believed that those agreements "clearly express an intent to apply to only national taxes and duties," and the court "d[id] not believe that the scheme of [those] agreement[s] is so pervasive as to permit the reasonable inference that Congress intended to preclude the state's power to tax" (84-902 J.S. App. A5; see 94-922 J.S. App. 2a; 84-1041 J.S. App. 28-29).

The court then addressed appellants' argument that Florida's tax, as applied to them, violates the Foreign Commerce Clause as interpreted by this Court in *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434 (1979). This Court there held that a state tax on the instrumentalities of foreign commerce is invalid if it either "creates a substantial risk of international multiple taxation" or "prevents the Federal Government from speaking with one voice when regulating commercial relations with foreign Governments" (441 U.S. at 451 (original quotation marks omitted)). The Florida Supreme Court noted that "the first requirement of *Japan Line* was not a concern [here] because there had been no de facto showing of multiple taxation or substantial risk of the same" in the instant cases (84-902 J.S. App. A6). Disagreeing with the trial court, however, it also held that Florida's tax satisfies the second requirement of *Japan Line,* emphasizing that the



federal bilateral agreements explicitly address only national duties and charges and "do[ ] not provide for exemptions from state excise taxes." The court "presume[d] this has been done intentionally" and concluded that Florida's tax accordingly does not "prevent[ ] our federal government from speaking with one voice" (84-902 J.S. App. A6).

Justice Overton, joined by Justice McDonald, dissented. They contended that "the individual states of this country are precluded by [the federal bilateral] agreements from taxing fuel used by foreign airlines," noting that, under the majority's holding, "United States airlines could, in turn, be subject to local government taxation on fuel in foreign countries" (84-902 J.S. App. A7). The dissenting justices thus concluded that Florida's tax, as applied to appellants, violates the Supremacy Clause and the Foreign Commerce Clause.

## DISCUSSION

This Court held in *Japan Line* that the Commerce Clause commits to the exclusive authority of the federal government the regulation of those aspects of foreign commerce which by their very nature require uniform national treatment. In our view, the imposition of levies and charges on airplane equipment and supplies, including aviation fuel, used by foreign airlines exclusively in international traffic is an aspect of foreign commerce that shares this nature. Florida's tax, as applied to appellants, is inconsistent with strongly-articulated federal policy in this area and with accepted international practice. The tax, as thus applied, should be invalidated.

### A. The Federal Government Is Committed To A Policy Of Reciprocal Tax Exemptions For Fuel And Supplies Used By Foreign Airlines In Foreign Commerce, And This Policy Represents The Established Practice Of Nations In The Aviation Field

This Nation's aviation relations with foreign governments are implemented through a comprehensive network of treaties, bilateral executive agreements, informal arrangements, and federal statutory provisions. The pattern produced by these varied strands, a pattern to which the federal government has long been committed, is one of reciprocal tax exemptions for aircraft, equipment and supplies, including aviation fuel, that constitute the instrumentalities of international air traffic. Due in part to our Nation's advocacy, this pattern has become the accepted international norm in the aviation field, a consensus that reflects the longstanding custom of nations in international maritime trade.

1. The United States and 156 other nations, including all of appellants' home countries, are parties to the Chicago Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, 61 Stat. 1180 *et seq.* That Convention binds its signatories to implement various measures to facilitate air transportation (arts. 22-28, 61 Stat. 1186-1188). One of these measures, set forth in Article 24(a), provides that aircraft engaged in international traffic, as well as "[f]uel, lubricating oils, spare parts, regular equipment and aircraft stores on board [such] an aircraft," shall, upon arrival in a contracting state, "be exempt from customs duty, inspection fees or similar national *or local* duties and charges" (61 Stat. 1186 (emphasis added)).

Article 24(a) explicitly applies only to aviation fuel and supplies which are "on board an aircraft * * * on arrival * * * and retained on board on leaving" a given country (61 Stat. 1186). Consistently with the purposes of the Chicago Convention, however, Article 24(a)'s policy of reciprocal exemptions has been accorded much broader scope. As a party to the Convention, the United States is a member of the International Civil Aviation Organization (ICAO), which was established by the Convention (arts. 43-66, 61 Stat. 1192-1200) to "[a]void discrimination among contracting States" and to "[p]romote generally the development of all aspects of international civil aeronautics" (art. 44, 61 Stat. 1193). During 1948-1951, the Air Transport Committee of ICAO, recognizing that the Convention "did not attempt to deal comprehensively with tax matters," undertook a "comprehensive study of the various existing and anticipated problems related to taxation in the field of international air transport." *ICAO's Policies on Taxation in the Field of International Air Transport,* ICAO Doc. 8632-C/968, at 1 (Nov. 1966) [hereinafter cited as *ICAO Policies*]. Upon completion of that study, the ICAO Council in 1951 adopted resolutions designed "to reduce to the fullest possible extent all forms of taxation on the sale or use" of the instrumentalities of air traffic (*id.* at 2).



During 1965-1966, ICAO exhaustively reviewed the responses of the Chicago Convention's contracting states to the 1951 resolutions. It found that "it is the common practice of many States with respect to ships and aircraft engaged in international navigation" not only "to exempt from taxation all fuel and lubricants on board on arrival" in a given territory, but also, "on a basis of reciprocity, to exempt from or refund taxes on fuel and lubricants taken on board at the final port of call in that territory." *ICAO Policies* 3. And ICAO found it desirable "to extend such exemptions or refunds to other consumable technical supplies, which, like fuel and lubricants, * * * are consumed during flight and are essential for that purpose" (*ibid.* (footnote omitted)).

Consistently with these findings, the ICAO Council adopted, on November 14, 1966, the following Resolution (*ICAO Policies* 3):

> [F]uel, lubricants and other consumable technical supplies taken on board [an aircraft] for consumption during [an international] flight shall be furnished exempt from all customs and other duties or, alternatively, any such duties levied shall be refunded * * *.

The Resolution defined "customs and other duties" to include "import, export, excise, sales, consumption and internal duties and taxes of all kinds levied upon the fuel, lubricants and other consumable technical supplies *by any taxing authority within a State*" (*id.* at 4 (emphasis added)).

The ICAO Council explained that this Resolution "endorsed the policy of reciprocal exemption" from taxes on aviation fuel used in international commerce, and that it reflected "longstanding maritime practice and the established policy of many States" (*ICAO Policies* 5). It noted that the policy of reciprocal tax exemptions had been "incorporated in the 1939 London Convention concerning Exemption from Taxation for Liquid Fuel and Lubricants Used in Air Traffic," a convention which had been "signed by representatives of 38 States" but which "never came into force as many of the signatories shortly thereafter found themselves at war" (*id.* at 1, 5). And the ICAO noted "the obvious practical difficulties inherent in adopting any other course," concluding that a policy of reciprocal tax exemptions by all taxing jurisdictions was "the only [course] available in the foreseeable future which would, in a simple and effective manner, assure equitable treatment for international aviation" (*id.* at 5).

Virtually all nations party to the Chicago Convention have substantially implemented the 1951 and 1966



ICAO Resolutions, and, accordingly, grant aviation fuel purchased by foreign airlines for use in international traffic a complete exemption from taxes, including sales, use, and excise taxes, regardless of whether such taxes are levied by the national government or by its political subdivisions.[6] The nations granting such across-the-board exemptions include most of our trading partners (such as Australia, China, Denmark, the Federal Republic of Germany, Greece, Japan, the Netherlands, Switzerland, and the United Kingdom), and most of the nations in which appellants are domiciled. The sole exception appears to be Canada, whose provinces impose taxes on aviation fuel and, like Florida, generally do not grant an exemption for fuel purchased by foreign airlines for use in foreign commerce. With that exception, however, the policy of reciprocal tax exemptions by all taxing authorities represents uniform international practice.

2. In the 38 years since the Chicago Convention came into force, the United States has signed bilateral aviation agreements with more than 70 foreign countries. Whereas the Convention itself is a treaty ratified by the Senate (see 61 Stat. 1180), these bilateral undertakings are typically executive agreements. They extend, with varying degrees of explicitness, a bilateral commitment parallel to that expressed multilaterally in Article 24(a) of the Chicago Convention and in ICAO's implementing Resolutions.

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[6] A few nations (such as France) appear to limit their reciprocal exemption policy to commercial aircraft, as opposed to private airplanes. We are informed by the State Department that political subdivisions in India have legal authority to impose sales taxes on aviation fuel. However, in response to a directive from the central government, all Indian states to which United States airlines fly currently exempt fuel uplifted by international carriers from sales tax.

Almost all our bilateral agreements obligate the United States to "exempt the designated * * * airlines of the other Contracting Party to the fullest extent possible under [our] national law, on the basis of reciprocity, from import restrictions, customs duties, excise taxes, inspection fees, and other national duties and charges on fuel, lubricants" and other equipment and supplies used in international air service.[7] Several agreements accomplish the same result by binding the United States to accord airlines of the other contracting party, with respect to taxes on aviation fuel and supplies, "treatment not less favourable than that granted to * * * carriers of the most favoured nation."[8] Some of the earlier compacts, like Article 24(a) of the Chicago Convention, expressly refer only to aviation fuel and supplies "introduced into" the United States or "retained on board [the] aircraft * * * upon arriving in or leaving" this country.[9] The more modern agreements,

[7] Air Transport Services Agreement, Oct. 2, 1969, United States-Jamaica, art. 8(A), 20 U.S.T. 2966, *reprinted at* 84-1041 J.S. App. 101. See, *e.g.*, Nonscheduled Air Service Agreement, May 8, 1974, United States-Canada, art. XII(1), 25 U.S.T. 794, *reprinted at* 84-902 J.S. App. A58; Air Transport Services Agreement, Aug. 15, 1960, United States-Mexico, art. 7, 12 U.S.T. 65, *reprinted at* 84-922 J.S. App. 90a; Air Transport Services Agreement, Oct. 24, 1956, United States-Columbia, art. 7, 14 U.S.T. 432, *reprinted at* 84-922 J.S. App. 85a.

[8] Air Transport Services Agreement, Feb. 11, 1946, United States-United Kingdom, art. 3(2), 60 Stat. 1500, *reprinted at* 84-922 J.S. App. 92a (governing aviation relations with Guyana and Trinidad & Tobago). See, *e.g.*, Air Transport Services Agreement, Jan. 8, 1947, United States-Ecuador, art. 3(b), 61 Stat. 2775, *reprinted at* 84-922 J.S. App. 89a; Air Transport Services Agreement, Dec. 27, 1946, United States-Peru, art. 3(b), 61 Stat. 2587, *reprinted at* 84-1041 J.S. App. 113.

[9] Air Transport Services Agreement, Jan. 8, 1947, United States-Ecuador, art. 3(b) and (c), 61 Stat. 2775, *reprinted at* 84-922 J.S. App. 89a. See, *e.g.*, Air Transport Services Agreement, Dec. 27, 1946, United States-Peru, art. 3(b) and (c), 61 Stat. 2587, *reprinted at* 84-1041 J.S. App. 113.



however, follow the 1951 and 1966 ICAO Resolutions by extending the reciprocal exemption privilege explicitly to cover items "supplied in" this country,[10] that is, aviation fuel and supplies "taken on board aircraft of the carriers of [the other] Contracting Party in the territory of the [United States] and intended solely for use in international air services."[11]

In according reciprocal exemptions for aviation fuel taken on board foreign aircraft within this country, our bilateral agreements typically refer to "national duties and charges,"[12] charges "imposed by the national authorities,"[13] or "federal taxes."[14] Some agreements refer to duties or charges "imposed by the * * * Contracting Party,"[15] others to "national duties or charges

[10] Air Transport Services Agreement, Oct. 20, 1983, United States-Costa Rica, art. 9(2)(a) and (c), *reprinted at* 84-922 J.S. App. 87a-88a. See, *e.g.*, Air Transport Services Agreement, Apr. 8, 1982, United States-Barbados, art. 9(2)(a) and (c), T.I.A.S. No. 10370, *reprinted at* 84-1041 J.S. App. 110.

[11] Nonscheduled Air Service Agreement, May 8, 1974, United States-Canada, art. XII(1)(c), 25 U.S.T. 794, *reprinted at* 84-902 J.S. App. A58. See, *e.g.*, Air Transport Services Agreement, Oct. 24, 1956, United States-Colombia, art. 7(D), 14 U.S.T. 432, *reprinted at* 84-922 J.S. App. 85a.

[12] *E.g.*, Air Transport Services Agreement, May 8, 1974, United States-Canada, art. XII(1), 25 U.S.T. 794, *reprinted at* 84-902 J.S. App. A58; Air Transport Services Agreement, Aug. 15, 1960, United States-Mexico, art. 7, 12 U.S.T. 65, *reprinted at* 84-922 J.S. App. 90a-91a.

[13] *E.g.*, Air Transport Services Agreement, Oct. 20, 1983, United States-Costa Rica, art. 9(1), *reprinted at* 84-922 J.S. App. 87a.

[14] *E.g.*, Air Transport Services Agreement, June 23, 1982, United States-Brazil, art. IX, *reprinted at* 84-922 J.S. App. 83a.

[15] *E.g.*, Air Transport Services Agreement, Feb. 11, 1946, United States-United Kingdom, art. 3(2), 60 Stat. 1500, *reprinted at* 84-922 J.S. App. 92a.

[imposed] by the contracting party,"[16] and others simply to "exemption from taxes,"[17] without specifying what taxing jurisdictions are meant to be covered. Exemptions from federal charges are implemented through a host of statutory and regulatory provisions, which accord foreign-owned instrumentalities of air traffic treatment parallel to that accorded foreign-owned instrumentalities of maritime trade.[18]

Unlike our earlier agreements, our most recent bilateral aviation compacts—generally, those dating from 1978 onwards—explicitly address taxes imposed by political subdivisions as well as by the federal government. These agreements typically commit the United States to "use its best efforts to secure for the designated airlines of the other Party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by State, regional and local authorities on [aviation fuel and supplies], except to the extent that the charges are based on the actual cost of providing the service."[19] Such "best efforts" clauses concerning state and local taxes are contained in agreements recently executed or negotiated with 18 foreign nations, including

[16] *E.g.*, Air Transport Services Agreement, Jan. 8, 1947, United States-Ecuador, art. 3(b), 61 Stat. 2775, *reprinted at* 84-922 J.S. App. 89a.

[17] *E.g.*, Air Transport Services Agreement, Sept. 22, 1977, United States-Argentina, art. F(3), 29 U.S.T. 2801, *reprinted at* 84-922 J.S. App. 82a.

[18] See, *e.g.*, 19 U.S.C. 1435 (entry of foreign vessels); 19 C.F.R. Pt. 4 (same); 49 U.S.C. App. 1509(c) (entry of foreign aircraft); 19 C.F.R. Pt. 6 (same); 26 U.S.C. 4221(a)(3), (d)(3) and (e)(1) (exemption from federal excise tax on the basis of reciprocity for fuel and supplies used in international air transport).

[19] *E.g.*, Air Transport Services Agreement, Apr. 8, 1982, United States-Barbados, art. 9(5), T.I.A.S. No. 10370, *reprinted at* 84-1041 J.S. App. 110.



the home countries of four of the appellants here (Barbados, Costa Rica, El Salvador and Jamaica)[20] and such important trading partners as China, the Federal Republic of Germany, Israel, and the United Kingdom.

3. As the above discussion reveals, none of our bilateral aviation agreements explicitly interdicts state or local taxes on aviation fuel used by foreign airlines in international traffic. To that extent, the bilateral agreements do not in terms reflect the full scope of our federal aviation policy, or the full scope of the international consensus evidenced by the 1951 and 1966 ICAO Resolutions, favoring reciprocal tax exemptions by *all* taxing jurisdictions. The reasons for this are largely of an economic and historical, partly of a legal, nature.

State taxation of international aviation has only recently become a matter of international concern. The period immediately following adoption of the Chicago Convention, when our bilateral agreements were first negotiated, coincided with the early days of commercial jet travel, a time when relatively few foreign airlines served the United States and when those that did serve it operated to a mere handful of international gateways here. Most foreign airlines purchased bonded fuel, which, under this Court's decisions (*McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414 (1940)), was exempt from state taxes, and which, prior to the 1973 OPEC oil embargo, was both inexpensive and readily available. State taxing authorities thus had little reason to regard international aviation as a potential source of revenue. In those

[20] See note 19, *supra*; Air Transport Services Agreement, Oct. 20, 1983, United States-Costa Rica, art. 9(5), *reprinted at* 84-922 J.S. App. 88a; Air Transport Services Agreement, Apr. 2, 1982, United States-El Salvador, art. 9(5), T.I.A.S. No. 10488, *reprinted at* 84-1041 J.S. App. 115; Air Transport Services Agreement, Apr. 4, 1979, United States-Jamaica, art. 10(6), T.I.A.S. No. 9613, *reprinted at* 84-1041 J.S. App. 104.

relatively rare instances where state tax laws did (at least theoretically) reach aviation fuel used by foreign airlines, those taxes (like Florida's prior to April 1, 1983) were of the "burn-off" variety, *i.e.*, were prorated on a mileage basis. Since foreign airlines traveled only briefly in such states' air space, they would pay little if any fuel tax in actual practice. Finally, our early aviation agreements were negotiated at a time when the Executive Branch entertained some doubt about its constitutional authority to enter into such compacts, which are typically executive agreements rather than treaties, much less to use them as a vehicle for preempting state laws. The State Department's usual practice, in any event, was to exercise restraint on this score, particularly where (as was until recently true here) state taxes were of little practical concern to our trading partners. See 11 Foreign Affairs Manual § 721.3(b) (Feb. 25, 1985) (State Department guidelines on treaties and other international agreements, or "Circular 175") (citing potential conflict with state law as a factor to be considered in deciding whether to enter into a treaty or an executive agreement).

The field of international aviation has changed dramatically in recent years. The number of foreign airlines serving the United States, and the number of domestic gateways to which they fly, have increased geometrically. See M. Brenner, J. Leet & E. Schott, *Airline Deregulation* 119 (1985). The price of aviation fuel has risen about 700% since the OPEC oil embargo. *Id.* at 106. Bonded fuel, which was once readily available at all gateways, is now available at only one or two.[21] In

[21] Following the OPEC embargo, the price of bonded fuel, which must be manufactured exclusively from crude oil produced abroad, rose sharply as compared with the price of fuel manufactured from domestic supplies. Subsequently-enacted federal price and allocation regulations (see 15 U.S.C. (1976 ed.) 751 *et seq.*) further



short, the very factors that once made international aviation an unlikely source of state revenue now make it a rather tempting target.

It is thus no accident that our most recent bilateral agreements expressly commit the United States and its contracting partners to use their "best efforts" to ensure exemption from regional and local, as well as national, taxes on aircraft fuel and supplies. Although these provisions stop short of explicitly banning such levies, they are very strong expressions of federal policy on the subject. Indeed, many of our bilateral aviation agreements, in specifying the federal government's obligations generally, use similar executory language, requiring the United States (for example) to grant exemptions from national duties "to the fullest extent possible,"[22] to make "efforts * * * to provide * * * for exemption from taxes,"[23] to "make all possible efforts to ensure * * * exemption from federal taxes,"[24] and to "exercise [its] best efforts" to ensure the availability of various privileges.[25] The Chicago Convention, similarly,

limited the availability of bonded fuel. Because of its relatively high price and scarcity, foreign carriers, which in 1968 had derived 90% of their fuel from bonded stocks, derived only 4% of their supply therefrom by 1977. See U.S. Dep't of Energy, *Findings and Views Concerning the Exemption of Kerojet Fuels from the Mandatory Petroleum Allocation and Price Regulations* 38-40 (1978). Owing to this shrinkage in demand, the elaborate dedicated delivery and storage systems for bonded fuel, established to meet Customs Service regulations, were dismantled or combined with non-bonded fuel supply networks.

[22] *E.g.*, Nonscheduled Air Service Agreement, May 8, 1974, United States-Canada, art. XII(1), 25 U.S.T. 794, *reprinted at* 84-902 J.S. App. A58.

[23] *E.g.*, Air Transport Services Agreement, Sept. 22, 1977, United States-Argentina, art. F(3), 29 U.S.T. 2801, *reprinted at* 84-922 J.S. App. 82a.

[24] *E.g.*, Air Transport Services Agreement, June 23, 1982, United States-Brazil, art. IX(4), *reprinted at* 84-922 J.S. App. 83a.

[25] *E.g.*, Nonscheduled Air Service Agreement, May 8, 1974, United States-Canada, art. XI(3), XVI(3), 25 U.S.T. 794, 796, *reprinted at* 84-902 J.S. App. A58, A60.

obligates the United States to implement certain measures "to the greatest possible extent" (art. 12, 61 Stat. 1183) or "so far as it may find practicable" (arts. 23, 28, 61 Stat. 1186, 1188). The "best efforts" clauses concerning state and local taxes in our recent bilateral agreements have equal dignity with these provisions, and are properly regarded by foreign nations as expressing a strong federal commitment to the policy of reciprocal tax exemptions by *all* taxing jurisdictions.

4. Federal aviation authorities have made aggressive efforts over the years to implement the policy of reciprocal exemptions both internationally and domestically. Diplomatic steps have regularly been taken to encourage foreign nations to make and, once made, to honor, commitments to accord tax exemptions for aviation fuel used by United States carriers in foreign commerce.[26] In 1982, the State Department received communications from the United Kingdom expressing concern about the imposition of aviation fuel taxes by political subdivisions in this country. The Department thereupon wrote the tax authorities of various states, including Florida, noting that "foreign governments have questioned the appropriateness of imposing [such levies] on foreign air carriers in view of the generally-accepted and longstanding international practice of reciprocally exempting such items" (84-922 J.S. App. 95a). Some nations, the Department noted, "have raised the possibility that state and local authorities in their jurisdictions could impose similar taxes on U.S. airlines," a result that "would frustrate the international system of reciprocal tax exemptions and thereby significantly increase the cost of international air transportation" (*ibid.*). The Department emphasized that this was "an important matter affecting U.S. international relations" and urged state revenue authorities to exempt foreign air carriers, on the basis of reciprocity, "from taxes on aviation fuel and other items for which the federal government grants an exemption" (*id.* at 94a-95a).

[26] See, *e.g.*, U.S. Civil Aeronautics Board, *FY 1976 Report to Congress* 103-104 (1977) (discussing steps taken to protest actions by Argentina and Colombia respecting aviation fuel taxes); U.S. Civil Aeronautics Board, *FY 1977 Report to Congress* 108, 109, 112, 114 (1978) (same, actions by Chile, Colombia, Japan, and the Philippines).



Several months later, Florida announced its proposal to extend its aviation fuel tax, effective April 1, 1983, to fuel consumed by foreign airlines in foreign commerce. The State Department again wrote the Florida Department of Revenue, noting that it was "surprised and distressed" to learn of this proposal, and again urging the State to exempt foreign airlines "based on reciprocity" (84-922 J.S. App. 99a). The Department warned that Florida's failure to afford such an exemption "will cause serious foreign relations problems" (*ibid.*).

The foreign relations problems predicted by the State Department quickly materialized. To date, the United States has received diplomatic notes from 25 foreign countries (App., *infra*, 1a-58a) protesting Florida's tax on aviation fuel and similar taxes, enacted or proposed, by Illinois (*id.* at 25a, 36a, 58a) and New York (*id.* at 48a). The protesting governments include many of appellants' home countries, as well as Belgium, France, the Federal Republic of Germany, Iceland, Israel, Italy, Japan, the Netherlands, Norway (on behalf of itself, Denmark, and Sweden), Panama, Spain, Switzerland, the United Kingdom, and Yugoslavia.

The diplomatic notes uniformly point to the "international consensus" (App., *infra*, 10a, 23a, 42a, 44a, 53a) and the "established international practice" (*id.* at 2a, 5a, 8a, 12a, 35a, 40a, 49a) of according reciprocal tax exemptions for aviation fuel used in international traffic. They emphasize that this consensus, as evidenced by

the 1951 and 1966 ICAO resolutions, entails exemption from regional and local, as well as from national, levies (App., *infra*, 2a, 5a, 6a, 8a, 13a, 20a, 23a, 30a, 35a, 37a, 40a, 46a-47a, 48a, 53a). Several foreign governments point out that their political subdivisions do not impose taxes on fuel purchased by United States airlines (*id.* at 1a, 5a, 8a, 13a, 21a, 50a, 53a, 57a), advising that their restraint in this respect is "based on the assumption that the United States will provide reciprocal treatment to [their] carriers" (*id.* at 1a). Florida's tax, in their view, "undermines the basis of reciprocity that has previously existed" between their nations and ours (*id.* at 2a, 9a, 21a, 53a), inviting retaliatory measures by local jurisdictions elsewhere (*id.* at 5a, 9a, 23a, 41a, 48a). The diplomatic notes repeatedly stress the damage that a proliferation of such taxes would cause to international aviation (*id.* at 9a, 10a, 14a, 23a), and, in several instances, take the position that Florida's tax is inconsistent with the bilateral aviation compacts that the United States has executed with their governments (*id.* at 2a, 5a, 13a, 16a, 31a, 37a, 46a, 53a).

**B. A State Tax Is Invalid Under The Commerce Clause If It Frustrates Attainment Of Federal Uniformity On An Aspect Of Foreign Commerce As To Which Federal Uniformity Is Essential, And Thus Prevents The Federal Government From Speaking With One Voice When Regulating Commercial Relations With Foreign Countries**

1. In *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), this Court outlined the constitutional analysis to be employed under the Commerce Clause where a state seeks to tax the instrumentalities of foreign commerce. Appellants there were six Japanese maritime companies whose cargo shipping containers were subjected to an ad valorem property tax in California (441 U.S. at 436). The containers, like the ships on which they were carried, were owned by the Japanese companies, were domiciled and registered in Japan, and were used exclusively in international traffic (*id.* at 436-437).

This Court assumed arguendo that the property tax, as applied to the Japanese containers, would pass the nexus, apportionment, and nondiscrimination tests of *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977), and hence would be valid under the Commerce Clause "if the containers at issue * * * were instrumentalities of purely interstate commerce" (441 U.S. at 445, 451). However, because the containers were "instrumentalities of foreign commerce," the Court held that it was necessary to answer two further questions in assessing the tax's validity: "first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from speaking with one voice when regulating commercial relations with foreign governments" (*id.* at 451 (original quotation marks omitted)). "If a state tax contravenes either of these precepts," the Court held, "it is unconstitutional under the Commerce Clause" (*ibid.*).

The Court concluded that California's tax, as applied, failed both of these tests (441 U.S. at 451, 453). It noted that the containers were taxed on their full value in Japan, so that California's levy necessarily caused international multiple taxation (*id.* at 436, 446-448, 451-452). And it held that California's tax would "frustrate attainment of federal uniformity" in an area—the imposition of charges on cargo containers used exclusively in international traffic—"where federal uniformity is essential" (*id.* at 448, 453).

The Court relied principally on two considerations in determining that the taxation of cargo containers was a

subject "necessitat[ing] a uniform national rule" (441 U.S. at 449). First, the Court noted that California's levy "create[d] an asymmetry in the international tax structure" (*id.* at 450). A state tax on foreign commerce, the Court said, "must be evaluated in the realistic framework of the custom of nations" (*id.* at 454). Under longstanding international practice, "[o]ceangoing vessels" and "[a]ircraft engaged in international traffic" were immune from taxation except by the nation of their registry or domicile (*id.* at 447 n.11). Cargo shipping containers were likewise regarded by the world community as "instruments of international traffic" (*id.* at 445-446 & n.10), and Japan accordingly taxed appellants' containers "consistently with the custom of nations" (*id.* at 447, 454) with the legitimate expectation that they would not be taxed elsewhere.[27]

A corollary of the "novel[ty]" of California's tax, when viewed against the established custom of nations, was the risk that other countries would retaliate against American carriers, a result that would plainly "place * * * impediments before this Nation's conduct of its foreign relations and its foreign trade" (441 U.S. at 450, 453). It was stipulated that "American-owned containers are not taxed in Japan," so that California's tax "create[d] an asymmetry in international maritime taxation operating to Japan's disadvantage." Under these circumstances, "[t]he risk of retaliation by Japan" was, in the Court's words, "acute." *Id.* at 453. Indeed, the Court noted that some nations provide a tax exemption for foreign-owned instrumentalities of commerce "only if the owner's country grants a reciprocal exemption"

[27] In our brief amicus curiae in *Japan Line* (77-1378 Br. at 14a), we noted the State Department's findings that "no foreign government, or political subdivision such as a province, state or municipality, imposes property taxes on foreign flag vessels, airlines, or containers, with the possible exception of Afghanistan."



(*id.* at 453 n.18). Hence, "[r]etaliation by some nations could be automatic" and "of necessity would be directed at American transportation equipment in general, not just that of the taxing State, so that the Nation as a whole would suffer" (*id.* at 450, 453 & n.18).

The second factor which the Court in *Japan Line* held to evidence "[t]he desirability of uniform treatment of containers used exclusively in foreign commerce" was the Customs Convention on Containers, May 18, 1956, 20 U.S.T. 301 *et seq.*, a multilateral compact ratified by the Senate to which both this country and Japan were party (441 U.S. at 452). Under that Convention, containers temporarily imported into this country are admitted free of customs duty and of "all duties and taxes whatsoever chargeable by reason of importation" (*id.* at 453 (citing 20 U.S.T. 304)). The Court did not hold that the Container Convention preempted California's tax under the Supremacy Clause; indeed, the Convention does not address state and local taxes, or any taxes other than those "chargeable by reason of importation." But the fact that Congress "ha[d] not pre-empted the field by affirmative regulation" was not in the Court's view dispositive of the Commerce Clause outcome, since that Clause, " 'without the aid of congressional legislation . . . affords some protection from state legislation inimical to the national commerce' " (*id.* at 454, quoting *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 769 (1945)). The Container Convention, while not necessarily a source of preemption, was relevant to the Court's Commerce Clause inquiry because it "reflect[ed] a national policy to remove impediments to the use of containers as 'instruments of international traffic' " (441 U.S. at 453, quoting 19 U.S.C. 1322(a)), and hence showed that it would be inimical to the national commerce for California to tax foreign-owned containers as it sought to do.

2. In subsequent decisions, this Court has consistently reaffirmed the principles of *Japan Line,* both its general analytical approach and its particular sensitivity to state actions that may adversely affect this Nation's foreign commerce. See *South-Central Timber Development, Inc.* v. *Wunnicke,* No. 82-1608 (May 22, 1984), slip op. 18; *Container Corporation* v. *Franchise Tax Board,* 463 U.S. 159, 171, 184-197 (1983); *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont,* 445 U.S. 425, 446-449 (1980). With equal consistency, however, the Court has declined to expand the principles of *Japan Line* to invalidate state taxes imposed on the income of domestically-based multinational corporations. The Court has reached that result whether the income takes the form of foreign-source dividends (*Mobil Oil Corp.,* 445 U.S. at 446-448) or foreign-source operating earnings (*Container Corporation,* 463 U.S. at 169 n.7).

The Court in *Container Corporation* noted "a number of important [similarities]" (463 U.S. at 187) between that case and *Japan Line.* The multinational taxpayer in each case had demonstrated some degree of "actual double taxation" (463 U.S. at 184, 187 & n.22). And California in each case had adopted a taxing policy (in *Container Corporation,* the "unitary method" of apportioning transnational income) that reflected "a serious divergence" from the policy adopted by the federal government (in *Container Corporation,* the "arm's-length method" of allocating intercorporate income), a federal policy which in turn was "consistent with accepted international practice" (463 U.S. at 187). But the Court also noted that there were "a number of ways in which [*Container Corporation* was] clearly distinguishable from *Japan Line*" (463 U.S. at 187), and these distinctions were held to carry the day.

First, the Court noted (463 U.S. at 187-188), as it had in *Mobil Oil Corp.* (445 U.S. at 448), that there are substantial differences between taxes on the income of a domestic taxpayer and "ad valorem property taxes assessed directly upon instrumentalities of foreign commerce." Taxes on foreign ships and planes, obviously, burden commerce in a more immediate and concrete way than taxes on the international cash flows of a domestic company. The Court emphasized, moreover, the difficulty of trying to figure out where the income of a multinational unitary business is really "earned." *Container Corporation,* 463 U.S. at 164-169, 192. Accord, *e.g., Exxon Corp.* v. *Wisconsin Dep't of Revenue,* 447 U.S. 207, 222 (1980); *Mobil Oil Corp.,* 445 U.S. at 438-439. Such difficulties, of course, do not attend efforts to ascertain the registry of an airplane or the home port of a ship.



A corollary of this difference between taxes on instrumentalities and taxes on income was a marked difference in "the alternatives reasonably available to the taxing State" (463 U.S. at 189, 192). In *Japan Line,* the state could avoid any burden on foreign commerce "simply by adhering to one bright-line rule: do not tax, to any extent whatsoever, cargo containers 'that are owned, based, and registered abroad and that are used exclusively in international commerce' " (463 U.S. at 189-190 (quoting 441 U.S. at 444)). To require that the State in *Japan Line* adhere to this rule "was by no means unfair, because the rule did no more than reflect consistent international practice and express federal policy" (463 U.S. at 190). In *Container Corporation,* by contrast, the state could not reasonably be expected utterly to refrain from taxing the domestic company's income, some of which was plainly earned within the state; and the question thus boiled down to a choice between competing allocation methods, each of which was concededly imperfect (463 U.S. at 182-184), and each of which could end up burdening foreign commerce depending on the particular facts involved (*id.* at 188 &

n.25, 190-193). In short, the Court did not believe that there existed in *Container Corporation,* as there existed in *Japan Line,* any method, at once obvious and fair, by which the state could ensure that foreign commerce would be perfectly protected.

Secondly, the Court in *Container Corporation* emphasized that the tax there "f[ell], not on the foreign owners of an instrumentality of foreign commerce, but on a corporation domiciled and headquartered in the United States" (463 U.S. at 188). "The most obvious foreign policy implication of a state tax," the Court noted, "is the threat it might pose of offending our foreign trading partners and leading them to retaliate against the Nation as a whole" (*id.* at 194 (citing *Japan Line,* 441 U.S. at 450)). Given the American residency of the taxpayer in *Container Corporation,* the risk of retaliation in that case, relatively speaking, was slight, for foreign governments generally have little interest "in reducing the tax burden of domestic corporations" (463 U.S. at 195). The Court observed that it had "specifically left open in *Japan Line* the application of that case to 'domestically owned instrumentalities engaged in foreign commerce'" (463 U.S. at 188-189 (quoting 441 U.S. at 444 n.7)), and, contrariwise, it specifically left open in *Container Corporation* the application of that case to the income of foreign or foreign-owned corporations (463 U.S. at 189 n.26).[28]

Besides the taxpayer's American domicile, the Court in *Container Corporation* cited other factors suggesting that the foreign relations impact there, as compared with *Japan Line,* would likely be marginal. Whereas in *Japan Line* "a convention signed by the United States

[28] Since the instant appeals present challenges to a state excise tax on aviation fuel, the Court in these cases would likewise have no occasion to address the validity of state income taxes imposed on foreign or foreign-owned corporations.



and Japan made clear * * * that neither National Government could impose a tax on temporarily imported cargo containers whose home port was in the other nation" (463 U.S. at 185), no comparable multilateral treaty existed in the income tax field. Although the United States had signed bilateral income tax agreements with many foreign nations, none addressed "the taxing activities of subnational governmental units such as States" (463 U.S. at 196 (footnote omitted)). Whereas the tax in *Japan Line* had created an asymmetry in international maritime taxation that *automatically* operated to foreign countries' disadvantage (463 U.S. at 194-195 (citing *Japan Line,* 441 U.S. at 453)), the Court did not believe that the same was true in *Container Corporation,* since California's "unorthodox treatment" could on the Court's view help or hurt a given taxpayer depending on the particular facts involved (463 U.S. at 195). Finally, the Court "note[d] * * * that in [*Container Corporation*], unlike *Japan Line,* the Executive Branch ha[d] decided not to file an *amicus curiae* brief in opposition to the state tax" (463 U.S. at 195 (footnote omitted)). For all these reasons, the Court concluded that California's unitary method of taxing domestic companies' income, unlike California's tax on the instrumentalities of foreign commerce in *Japan Line,* neither "implicate[d] foreign policy issues which must be left to the Federal Government" nor "violate[d] a clear federal directive," and hence did not prevent this Nation from speaking with one voice in foreign affairs (463 U.S. at 194).

### C. Florida's Tax On Aviation Fuel Used By Foreign Airlines Exclusively In Foreign Commerce Is Inconsistent With Express Federal Policy And Established International Practice And Hence Should Be Invalidated Under The Commerce Clause

These cases present a substantial federal question concerning the power of a state to levy an excise tax on the instrumentalities of foreign commerce. This question is not directly controlled by any of this Court's prior decisions. However, we think that the situation here comes very close indeed to that presented in *Japan Line,* and we believe that Florida's tax should be declared unconstitutional as applied.

1. We agree with the courts below (see 84-902 J.S. App. A6, A33) that the "multiple taxation" aspect of *Japan Line* is not a concern in the instant cases. Appellants have not proved—indeed, they have not argued—that Florida's sales tax on aviation fuel "produces multiple taxation in fact" (*Japan Line,* 441 U.S. at 452). Nor do we think that Florida's tax "creates a substantial risk of international multiple taxation" (*id.* at 451). As this Court has noted in sustaining analogous state taxes on aviation fuel used by domestic carriers on interstate flights, the "taxable event" is the carrier's purchase of the fuel or its "withdrawal [of the fuel] from storage." *United Air Lines, Inc.* v. *Mahin,* 410 U.S. 623, 627 (1973). Accord, *Edelman* v. *Boeing Air Transport, Inc.,* 289 U.S. 249, 251-252 (1933); *Eastern Air Transport, Inc.* v. *South Carolina Tax Comm'n,* 285 U.S. 147, 152-153 (1932).[29] These taxable events, obviously, take place entirely within the taxing state, and no foreign government, consistently with the custom of nations, could undertake to impose a levy upon them. In fact, far from being able to tax the event of sale, foreign nations could not purport to tax even the fuel itself, which typically will be consumed in international air space en route from the United States.

[29] These cases clearly do not control the outcome here. In each case, the airline was a domestic rather than a foreign corporation, and it appears that solely interstate, rather than international, flights were involved. See *United Air Lines, Inc.,* 410 U.S. at 624, 625, 629; *Edelman,* 289 U.S. at 250-251; *Eastern Air Transport, Inc.,* 285 U.S. at 150-151. In any event, the cases were decided long before this Court in *Japan Line* set forth the constitutional analysis to be employed when a state seeks to tax the instrumentalities of foreign commerce.



2. We agree with appellants, however, that Florida's tax is invalid under the "federal uniformity" aspect of *Japan Line,* which, as the Court there emphasized (441 U.S. at 451), is a separate and independent basis for invalidating a state tax under the Foreign Commerce Clause. In our view, the salient features of these cases put them virtually on a par with *Japan Line* and distinguish them in equal measure from *Container Corporation.* Those features, which we have already discussed in one way or another, may be briefly recapitulated:

First, the airlines here, like the shipping companies in *Japan Line,* are foreign rather than domestic corporations. Indeed, besides being domiciled abroad, many of the airlines are wholly or substantially owned by their national governments. See page 3, *supra.*

Second, the state tax here is imposed, as in *Japan Line,* not on income, but directly on the instrumentalities of foreign commerce. In *Japan Line,* the Court noted that the cargo containers sought to be taxed were associated with the ships that carried them both in our bilateral and in our multilateral agreements (441 U.S. at 436 n.1, 446 n.10, 452-453). Here, similarly, aviation fuel taken on board for use in international traffic is associated with the aircraft that carries it both in the

Chicago Convention and the ICAO Resolutions (see pages 10-13, *supra*) and in our bilateral aviation compacts (see pages 13-17, *supra*). These agreements evidence an international understanding that aviation fuel, no less than the shipping containers at issue in *Japan Line,* is an "instrument[ ] of international traffic" (441 U.S. at 446 n.10, 453).

Third, the state tax here, like the tax in *Japan Line,* "creates an asymmetry in the international tax structure" (441 U.S. at 450) which, unlike the tax in *Container Corporation,* operates *automatically* to foreign nations' disadvantage (see 463 U.S. at 194-195). The uniform practice of nations, evidenced by the Chicago Convention, the ICAO Resolutions, and other countries' implementation of those Resolutions, calls for the instrumentalities of international air traffic to be exempt from all taxes and duties (other than user fees) imposed *either* by national governments *or* by their political subdivisions. Indeed, this policy of reciprocal tax exemptions for the instrumentalities of airborne and maritime trade is the very same "custom of nations" upon which the Court in *Japan Line* relied (441 U.S. at 447 & n.11, 453 & n.18) in invalidating the tax there involved.

Fourth, there exists here, as in *Japan Line,* an "express federal policy" (*Container Corporation,* 463 U.S. at 190), evidenced by multilateral agreements, bilateral agreements, the federal statutory scheme, and consistent regulatory practice, favoring reciprocal tax exemptions for aviation fuel and supplies used in foreign commerce. Our bilateral aviation compacts do not expressly preempt, any more than the Container Convention in *Japan Line* expressly preempted, state taxes on aviation fuel. However, those agreements do "reflect[ ] a national policy to remove impediments to the use of [aircraft] as instruments of international traffic." *Japan Line,* 441 U.S. at 453 (original quotation marks omitted).



Fifth, it is possible here, as it was possible in *Japan Line,* for the state to avoid any burden whatsoever on foreign commerce by adhering to "a single internationally accepted bright-line standard" (*Container Corporation,* 463 U.S. at 193), namely, "do not tax, to any extent whatsoever, [fuel and supplies used by aircraft] 'that are owned, based, and registered abroad and that are used exclusively in international commerce.' " *Id.* at 189-190 (quoting *Japan Line,* 441 U.S. at 444). Here, as in *Japan Line,* "[t]o require that the State adhere to this rule [is] by no means unfair, because the rule [does] no more than reflect consistent international practice and express federal policy" (*Container Corporation,* 463 U.S. at 190). The difficulties that might attend state efforts absolutely to avoid burdening foreign commerce where income taxes are concerned simply do not arise in these cases.

Finally, the tax involved here, like the tax involved in *Japan Line,* clearly "implicate[s] foreign affairs" (*Container Corporation,* 463 U.S. at 194). The State Department has received diplomatic notes from 25 foreign nations protesting Florida's tax in the strongest terms. These notes reflect concern, not only about the instant tax, but about the possibility that "other States [will] follow[ ] the taxing State's example" (*Japan Line,* 441 U.S. at 450-451). See App., *infra,* 3a, 6a, 21a, 42a, 52a. Foreign nations' concerns in this respect have proven justified, since Florida's example has already been followed by Illinois[30] and Massachusetts,[31] and a bill

[30] See Ill. Admin. Reg. § 130.2080(c) (1984) (repealing exemption from sales tax on purchases of aviation fuel previously granted to companies whose stock was "owned exclusively or in part by foreign governments"). A lawsuit challenging this action was recently filed in Illinois trial court by ten foreign airlines. *Air Canada, et al.* v. *Department of Revenue of the State of Illinois,* No. 85CH-6973 (Cook County Cir. Ct. July 12, 1985).

[31] See Mass. Act of July 1, 1985, ch. 145, §§ 7, 9 (enacting new 5¢-per-gallon excise tax on aviation fuel and affording no exemp-

that would accomplish the same result has been introduced in California.[32] The diplomatic notes stress that a proliferation of aviation fuel taxes would prevent this country from offering "true reciprocity" to our trading partners (App., *infra*, 23a), provoking the threat of foreign retaliation that would jeopardize the reciprocal exemption policy.[33]

3. For these reasons, we believe that the Court should note probable jurisdiction in the instant three appeals. The cases involve airlines from 14 different countries, whose bilateral agreements with the United States differ in subtle ways. Although the outcome in our view should generally be dictated by overriding federal policy and established international practice rather than by the idiosyncratic provisions of particular compacts, we think the Court would benefit from having all the relevant fact patterns before it. Particularly might this be true in the case of the Canadian airline, appellant in

tion for fuel purchased by foreign airlines for use in foreign commerce). The Massachusetts law provides that the new tax shall not be construed "to apply to foreign or interstate commerce, except insofar as the same may be permitted under the provisions of the constitution and laws of the United States." *Id.* § 7 (to be codified at Mass. Gen. Laws Ann. ch. 64J, § 10).

[32] Assembly Bill 2341, Cal. Leg., 1985-1986 Reg. Sess. § 5 (as amended May 24, 1985) (repealing fuel tax exemption previously granted to airlines holding common carrier certificates under the laws of the United States "or of any foreign government").

[33] Besides the possibility of imposing taxes, foreign governments have at their disposal numerous other techniques for discriminating against United States airlines. They can levy artificially-inflated "user fees"; impose obstacles to repatriation of foreign earnings; route airlines to less desirable airports; refuse to let carriers use baggage handlers of choice; give local airlines preference in carrying air cargo; restrict United States airlines' local advertising; or impose excessively complicated customs procedures or other delays and inconveniences. See U.S. Civil Aeronautics Board, *FY 1976 Report to Congress* 103-108 (1977).



No. 84-902, which, owing to Canada's failure to accord American carriers reciprocal exemptions from provincial taxes on aviation fuel (see page 13, *supra*), could conceivably be situated differently from the other appellants.

## CONCLUSION

Probable jurisdiction should be noted in No. 84-902; in No. 84-922, limited to the first question presented therein; and in No. 84-1041, limited to the first two questions presented therein.[34] For the reasons stated in our companion brief in Nos. 84-921, 84-926 and 84-929, the other questions presented here are insubstantial.

Respectfully submitted.


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SEPTEMBER 1985

[34] The Court may wish to consolidate the cases for oral argument.

## APPENDIX

EMBASSY
OF THE
ARGENTINE REPUBLIC

D.E. No. 910

The Embassy of the Argentine Republic presents its compliments to the Department of State and has the honor to refer to the lawsuit *Lineas Aereas Costarricenses, S.A. v. State of Florida*, which it understands is currently pending before the Supreme Court of the United States. The Embassy of the Argentine Republic wishes to request that the United States support the position taken by the Argentine carrier and many other South American airlines in that case by making a formal presentation before the Court.

It is the policy of Argentina to exempt United States airlines from taxes on aviation fuel purchased by them in Argentine territory. As a result, United States airlines pay no fuel taxes to any governmental authority at any level in Argentina. This policy is based on the assumption that the United States will provide reciprocal treatment to Argentine carriers. Recent events in the State of Florida have called that assumption into question.

The Embassy understands that the State of Florida has imposed a 5.7¢ per gallon tax on aviation fuel purchased in that jurisdiction. We also understand that this tax applies to all fuel purchased by international airlines whether or not it is consumed within United States territory. The Embassy of the Argentine Republic is concerned that this tax, if allowed to stand, will place the United States in conflict with provisions of a number of international

agreements and the established international practice of providing exemptions from fuel taxes. They may, in turn, undermine the basis of reciprocity that has previously existed between the United States and Argentina.

The Embassy of the Argentine Republic would call the attention of the Department of State to Article 24 of the Chicago Convention and, in particular, to resolutions adopted by the Council of the International Civil Aviation Organization on November 14, 1966. These documents make clear the established international practice that airlines should not be required to pay taxes on items such as fuel. They also make it clear that this policy extends not only to taxes imposed by the Central Government, but also those established by local jurisdictions.

The current Air Tansport Services Agreement between the United States and Argentina applies this principle in the United States-Argentina markets. Article F of that agreement requires both parties to provide for exemption from taxes. The Embassy of the Argentine Republic notes that this provision is not limited to taxes imposed at any particular level of government and is clearly intended to cover all taxes and similar governmental charges. On the basis of this provision, Argentina has provided tax exemptions to United States airlines. The Embassy of the Argentine Republic respectfully submits that consistent with this agreement, the Government of the United States should do the same. This would require exemption of Argentine carriers from the Florida tax.

The Embassy of the Argentine Republic also notes that there are strong policy reasons supporting the rule against taxation of airline fuel. Many airlines



presently face serious economic challenges and cannot afford the additional burden that fuel taxes would impose on them. These airlines would be compelled to pass this tax onto their passengers and shippers. This would adversely affect the development of international aviation. Additionally, the Embassy of the Argentine Republic would note that if the Florida tax is found acceptable under United States law, other jurisdictions in the United States are likely to impose similar taxes. Indeed, the Embassy of the Argentine Republic understands that the State of Illinois has already taken such action in reliance upon the recent decision of the Florida Supreme Court upholding this tax. The Embassy of the Aregntine Republic is concerned that the establishment of such taxes would not only increase the expenses that airlines and their customers must bear, but would also pose difficult administrative problems. The Embassy of the Argentine Republic believes this would be inconsistent with the many international agreements calling for the establishment of uniform practices affecting international aviation. In view of all of these factors, if the Florida tax is permitted to be imposed, the Embassy of the Argentine Republic believes that foreign countries would feel compelled to re-examine critically whether the United States is, in fact, providing a satisfactory degree of reciprocity regarding fuel taxes.

The Embassy of the Argentine Republic understands that the validity of this tax is now under review in the Supreme Court of the United States in the *Lineas Aereas Costarricenses, S.A.* lawsuit previously mentioned. The Embassy of the Argentine Republic respectfully requests the United States to support the position of the foreign airlines challenging

this tax through the submission of an *amicus curiae* brief to the United States Supreme Court and to bring to the attention of that Court the implications that this tax has for the established system of international aviation.

The Embassy of the Argentine Republic wishes to advise the Department of State that this note should not be considered confidential and that it may be released to the public.

The Embassy of the Argentine Republic avails itself of this opportunity to express renewed assurances of its highest consideration.

Washington, D.C., December 27, 1984



AMBASSADE DE BELGIQUE

The Belgian Embassy presents its compliments to the State Department and wishes to draw its kind attention to the subject of fuel taxes imposed by States of the United States on international aviation.

Belgium exempts at all levels of its government fuel used in international airline operations by United States carriers. This exemption is based on reciprocity.

Belgium emphasizes the established international consensus favoring reciprocal exemption from taxes on the basis of Article 24 of the Chicago Convention as well as the resolutions of the ICAO Council of November 14, 1966 (ICAO Document 8632-C/968).

It is well known that many airlines are facing at the present time serious economic challenges and can ill afford the extra financial burden these taxes impose. Under these circumstances, similar taxes could be imposed by other governments including the government of Belgium.

Finally, State fuel taxes are incompatible with Article 9 of the bilateral aviation agreement between the United States and Belgium which specifically commits the United States Federal Government to use its "best efforts" to obtain exemption of taxes at all levels including the state and local level.

The Embassy of Belgium welcomes the opportunity to renew to the Department of State the assurances of its highest consideration.

Washington D.C., November 30, 1984.

## [EMBASSY OF THE FEDERATIVE REPUBLIC OF BRAZIL]

No. 9

The Embassy of the Federative Republic of Brazil presents its compliments to the Department of State and has the honor to refer to the imposition of fuel taxes on foreign airlines by the State of Florida.

Such legislation, effective April 1, 1983, imposes a 5.7 cents per gallon tax on all aviation fuel purchased in the State of Florida, regardless of whether it is to be consumed in Florida or outside the United States.

This matter is of the greatest concern to the Brazilian Government for the following reasons:

A) a state fuel tax on international airlines appears to be incompatible with the spirit of paragraph VII of the Memorandum of Consultation of June 14, 1984, regulating bilateral civil aviation relations. In it each party agreed to the commitment "to make all possible efforts to ensure that the airlines of each country can operate at the maximum efficiency with a fair and equal opportunity".

B) the imposition of such state fuel tax may be deemed to be contrary to Article 24 of the Convention on International Civil Aviation (Chicago Convention), which provides that fuel on board an aircraft of a Contracting State shall be exempt from customs duty, inspection fees or similar national or local duties and charges. Further resolutions by the ICAO Council also provide for exemption from customs and all duties from fuel taken by foreign airlines.

C) other states in this country appear to be encouraged by the Florida fuel tax and seem to be inclined to impose similar taxes of their own.



D) like many other airlines, Brazilian airlines serving the US-Brazil market are currently facing serious economic challenges for which the Florida fuel tax would represent an additional financial burden.

The Brazilian Embassy is informed that a number of foreign airlines, [including] the Brazilian carrier VARIG S.A., will soon appeal to the United States Supreme Court the decision of the Florida Supreme Court of June 14, 1984, which reversed a lower State Court judgment exempting foreign airlines [from] the aforementioned tax. The Brazilian Embassy would appreciate it if the United States Government would extend formal support to the position of the plaintiffs through an *amicus curiae* brief to the Supreme Court, or any other means deemed appropriate.

The Embassy of the Federative Republic of Brazil avails itself of this opportunity to renew to Department of State the assurances of its highest consideration.

Washington, D.C., January 8, 1985.

EMBAJADA DE COLOMBIA
WASHINGTON

No. 1679/E-375

The Embassy of Colombia presents its compliments to the Department of State and has the honor to refer to the legal action instituted by a group of South American airlines entitled *Lineas Aereas Costarricenses, S.A., et al. v. State of Florida Department of Revenue*. The Colombian airline AVIANCA is one of the plaintiffs in this suit, which is now before the Supreme Court of the United States. This lawsuit challenges the validity of a law of the State of Florida imposing a tax of nearly six cents per gallon upon fuel taken aboard by the foreign airlines at Florida airports for international use.

The Embassy of Colombia wishes to bring to the attention of the Department of State its conviction that it is totally inappropriate for local jurisdictions to impose taxes upon fuel intended for use by international airlines. For many years there has been an established practice among nations of exempting fuel purchased by international airlines from tax. This practice is demonstrated in Article 24 of the Convention on International Civil Aviation and resolutions on this subject adopted by the Council of the International Civil Aviation Organization on November 14, 1966. This policy has played an important role in the healthy growth of international aviation by preventing an inappropriate financial burden on airlines and their customers.

Consistent with this international practice, Colombia does not impose taxes at the national or local level upon fuel intended for international airline use. Therefore, all American airlines in Colombia are



fully exempt from fuel taxes at all levels of government. This exemption is based upon effective reciprocity from the United States, including taxing authorities in state and local governments. The Embassy of Colombia views the imposition by the State of Florida of a tax upon fuel intended for use by Colombian carriers as an infringement upon the reciprocity that had previously been established.

The Embassy of Colombia also wishes to point out that the example of Florida could set a precedent to be followed by other governments. If the United States allows its states to impose taxes upon fuel purchased by international airlines, the airlines of the United States could very soon see the initiation of local or national taxes by other nations. The development of such a pattern would surely be detrimental to the interests of all concerned and harmful to the development of aviation.

The Embassy of Colombia understands that the LACSA lawsuit is now pending before the Supreme Court of the United States and strongly urges the United States to formally support the position of the international airlines by submitting to the Supreme Court a brief as *amicus curiae*. The active involvement of the United States in the Supreme Court proceedings would be viewed by Colombia as an appropriate action by the United States in fulfillment of its commitment to provide reciprocal tax exemption in matters regarding international aviation.

The Embassy of Colombia informs the Department of State that the contents of this note are not classified and can be disclosed.

The Embassy of Colombia avails itself of this opportunity to renew to the Department of State the assurance of its highest consideration.

EMBAJADA DE COSTA RICA
WASHINGTON, D.C. 20008

No. 893

October 24, 1984

Dear Mr. Secretary:

I have the honor to address your Excellency with respect to the matter of the imposition of fuel taxes by the State of Florida on international aviation, as well as similar taxes imposed by other local jurisdictions in the United States.

As your Excellency may know, reciprocal tax exemption treatment has been the practice worldwide to aircraft serving international routes. There is an international consensus expressed in Article 24 of the Chicago Convention as well as in ICAO resolution Document 8632-C/968.

Furthermore, the unilateral imposition of fuel taxes on international aviation on the part of the State of Florida is contrary to and violates the spirit of bilateral aviation agreements which provide for exemptions on the basis of reciprocity from national duties and charges.

In addition, the imposition of such aviation fuel taxes, on the part of state tax authorities, is undesirable as a matter of policy. It is not only detrimental to the overall development of international aviation, but could result in a confusing administrative situation and the possibility of widespread aviation fuel taxes worldwide.

Excellency, as a group of international airlines are presenting this matter to the United States Supreme Court in the very near future, on behalf of my Government I would kindly request your good offices to



obtain the support of the Government of the United States before said Court in favor of the principle of the reciprocal fuel tax exemption treatment which is embodied in the letter and the spirit of international aviation relations.

Accept, Excellency, the assurances of my highest consideration.

/s/ Claudio A. Volio
CLAUDIO A. VOLIO
Ambassador

EMBAJADA DEL ECUADOR
WASHINGTON, D.C.

No. -4-2- 185/84

The Embassy of Ecuador presents its compliments to the Department of State and has the honor to request the Department's attention to the following matter.

The State of Florida has imposed a tax of 5.7 cents per gallon on all aviation fuel sold in the State. This tax, which became effective April 1, 1983, is applicable even if the fuel is consumed outside the state or even outside the United States. The tax is thus imposed on fuel purchased by Empresa Ecuatoriana de Aviación ("Ecuatoriana"), the flag carrier of Ecuador, and other Ecuadorean cargo airlines that operate in the State of Florida.

Numerous South American air carriers, including Ecuatoriana, have filed a lawsuit in the Florida state courts (*Líneas Aéreas Costarricenses, S.A. et al. v. State of Florida Department of Revenue*) to challenge this law as being in violation of the United States Constitution. In 1983 the trial court held that foreign air carriers must be exempted from the tax. This decision was reversed by the Florida Supreme Court in June 1984. The carriers have appealed the case to the United States Supreme Court.

The Embassy of Ecuador wishes to inform the Department of State of the grave concern of the Government of Ecuador concerning the imposition of this tax on international air carriers such as Ecuatoriana. It is inappropriate for local jurisdictions such as the State of Florida to impose taxes on fuel used by international air carriers. Under the established practice of nations such fuel purchases are exempt from



tax. Consistent with this practice Ecuador does not impose taxes at the national or local level on fuel used by international air carriers. The Florida tax is inconsistent with this international standard of reciprocity.

This established practice of nations is also demonstrated by Article 24 of the Convention on International Civil Aviation ("Chicago Convention") and resolutions adopted by the Council of the International Civil Aviation Organization on November 14, 1966 (ICAO Document 8632-C/968). The Council resolved that "when an aircraft registered in one State departs from an international airport of another State either for another customs territory of that latter State or for the territory of any other State, the fuel, lubricants and other consumable technical supplies taken on board for consumption during the flight shall be furnished exempt from all customs and other duties." The term "customs and duties" includes "import, export, excise, sales, consumption and internal duties of all kinds levied upon fuel, lubricants and other consumable technical supplies by any taxing authority within a State." (Sec. 1, paras. 1 and 4).

The Embassy of Ecuador further regards the Florida tax on fuel to be used by Ecuatoriana as being inconsistent with the Air Transport Services Agreement between the Governments of the United States and Ecuador (TIAS 1606), which provides for exemption of fuel from "customs, inspection fees or similar duties or charges." (Art. 3 (c)). Consistent with the Agreement, as indicated above, Ecuador does not impose taxes at the national or local level on fuel used by international air carriers.

The imposition of Florida's tax could set a precedent for similar action by other governments. If that were to happen international air carriers—including those of the United States—would be substantially burdened by taxes imposed by national or local [authorities] of other nations. This would be detrimental to the maintenance and development of international aviation.

The Embassy of Ecuador understands that participation by the United States Government in the litigation before the Supreme Court in support of the position of the international air carriers would be important in protecting their interests. It further understands that the United States has presented *amicus curiae* briefs in similar circumstances. Therefore, the Embassy of Ecuador urges that the Government of the United States file an *amicus curiae* brief with the Supreme Court supporting the position of the international air carriers.

The Embassy of Ecuador avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C., December 14, 1984



[EMBASSY OF EL SALVADOR]

1. Following is an informal translation of the text of Diplomatic Note 14139 dated December 3, 1984 from the government of El Salvador. Original is being pouched to department

2. I have the honor of addressing your Excellency with regard to air transport relations between the government of the United States of America and the government of El Salvador.

In particular allow me to call to the attention of Your Excellency a tax ruling regarding a tax on aviation fuel, established by the State of Florida and entered into force the first of April 1983, applying to airlines which do not have their principal offices in Florida, as is the case of the Salvadoran Air Line, Taca International Airlines, S.A.

Allow me to make known to Your Excellency, so that you can bring to the attention of the competent authorities of your government, that said ruling is not in accord with Article 9(2)(C) of the Air Transportation Agreement between the government of El Salvador and the government of the United States of America by virtue of which, on a reciprocal basis, are exempted from taxes "fuel, lubricants and the consumable technical supplies introduced into or supplied in the territory of a party for use in an aircraft of a designated airline of the other party engaged in international air transportation, even when these supplies are to be used on a part of the journey performed over the territory of the party in which they are taken on board." In this case, the principle established in this article, based on reciprocity, is not be-

ing applied by Your Excellency's government, while the North American Airlines enjoy this exemption.

On the other hand, based on Articles 9(5) and 11 (1, 2) of the Referenced Agreement, each party shall try to secure for the designated airlines of the other party, on the basis of reciprocity, an exemption from taxes imposed by state, regional and local authorities, with the objective of allowing a fair and equal opportunity for said airlines, using all appropriate methods within its jurisdiction to eliminate all forms of discrimination which adversely affect the competitive position of the airlines of the other party.

As a consequence of the fact that the action taken by the State of Florida contravenes Article 9(2)(C) and based on Article 9(5) and Article 11 (1, 2) the government of El Salvador urges your illustrious government to take the necessary actions to avoid application to the airline designated by El Salvador of this measure imposed contrary to the principles established in the air transportation agreement.

I take this opportunity to renew to Your Excellency the assurances of my highest and most distinguished consideration.



AMBASSADE DE FRANCE
AUX ETATS-UNIS

Washington, D.C.

30 novembre 1984

L'Ambassade de France présente ses compliments au Département d'Etat et a l'honneur de lui faire savoir ce qui suit:

La taxation sur les carburants des aeronefs instaurée par l'Etat de Florida à la suite d'une décision, en date du 11 avril 1983, préoccupe vivement les Autorités francaises.

1. En effet, cette mesure, susceptible à l'évidence d'être prise et appliquée dans d'autres Etats en termes voisins ou comparables, nous paraît, pour l'essentiel, en opposition avec l'esprit de notre accord bilatéral de services aériens du 27 mars 1946, notamment avec son article 3-C.

De même est-elle en opposition avec l'article 24 (A) de la Convention de Chicago en date du 7 décembre 1944.

Les autorités francaises croient donc devoir relever que le maintien d'une telle mesure risquerait de porter atteinte, du point de vue des responsabilités internationales, à la notion même d'accords bilatéraux de services aériens qui pourraient ainsi être modifiés de manière unilatérale et contrairement aux engagements formels souscrits par le gouvernement des Etats-Unis.

Cette constatation avait dèjà été faite par la note adressée le 5 mars 1984 par l'Ambassade à propos de l'affaire—analogue dans son esprit—de la suppression, dans l'Etat d'Illinois, de l'exonération de la taxe sur les achats effectués dans les aéroports.

2. En outre, cette mesure est contraire à la résolution ad hoc du Conseil de l'Organisation de l'Aviation Civile Internationale du 14 novembre 1966 qui prévoit à la section 1, paragraphes 2 et 4, que:

"lorsqu'un aéronef immatriculé dans un Etat part d'un aéroport international d'un autre Etat, soit à destination d'un autre territoire douanier de celui-ci, soit à destination du territoire d'un autre Etat, le carburant, les lubrifiants et autres produits consommables embarqués pour être consummés en vol doivent être fournis en franchise de tous droits de douane et autres, ou que les droits percus doivent être remboursés, à condition qu'avant de quitter le territoire douanier considéré, l'aéronef ait rempli toutes les formalités douanières et autres formalités de congé prescrites sur ce territoire."

Or, cette résolution, fondée sur la notion de réciprocité, est admise par tous les pays. Sa remise en cause porterait atteinte au climat des échanges internationaux; et elle constituerait une entrave certaine au développement des transports aériens internationaux, leur infligeant des surcoûts d'exploitation qui devraient alors être inévitablement supportés par les passagers.

S'agissant de la France, sa pratique est conforme à la résolution de l'OACI précitée, puisque les aéronefs immatriculés aux Etats-Unis, qui partent d'un aéroport francais à destination de n'importe quel autre Etat, sont exonérés, à raison du carburant et de produits embarqués, de la taxe sur la valeur ajoutée (TVA) par l'article 262-11-6 du code général des impôts, ainsi que de la taxe intérieure sur les produits pétroliers (TIPP) par l'article 192, section VI, du code des douanes.



Dans ces conditions, l'Ambassade de France, d'ordre de son Gouvernement, tient à appeler l'attention des Autorités américaines sur l'importance attachée à une solution rapide et heureuse de ce contentieux. Pour leur part, les Autorités francaises sont convaincues de la nécessité, pour les Autorités américaines, d'appuyer auprès de la Cour Suprême des Etats-Unis, la procédure engagée par un groupe de compagnies aériennes pour obtenir l'annulation de la mesure prise par l'Etat de Floride. Elles leur seraient donc reconnaissantes d'engager toute action adéquate dans ce sens.

Les Autorités francaises n'ont pas d'objections à ce que le contenu de cette note soit rendu public.

L'Ambassade de France saisit cette occasion pour renouveler au Département d'Etat l'assurance de sa très haute considération.

EMBASSY OF THE
FEDERAL REPUBLIC OF GERMANY
WASHINGTON, D.C.

The Embassy of the Federal Republic of Germany presents its compliments to the Department of State and has the honor to refer to the following:

By law effective April 1983, the State of Florida imposed a tax of 5.7 cents per gallon on all aviation fuel sold in Florida, regardless where the fuel is consumed. A group of airlines challenged the legality of the tax in the courts. On June 1, 1983, the Second Circuit Court in and for Leon County, Florida, decided that foreign carriers serving Florida must be exempted from the tax. On appeal by the State of Florida, however, the Florida Supreme Court, on June 14, 1984, reversed the lower court's judgment and held that the imposition of the tax on foreign airlines is legal. The airlines have appealed this decision to the United States Supreme Court.

For the reasons set forth below, the Embassy of the Federal Republic of Germany would appreciate it if the Department of State would support the position of the airlines by an amicus curiae brief to the United States Supreme Court:

1. Article 24 of the Convention on International Civil Aviation provides that fuel on board an aircraft of a Contracting State shall be exempt from customs duty, inspection fees or similar national or local duties and charges. Furthermore, a resolution adopted by the ICAO council on November 14, 1966 (ICAO-Doc. 8362-C/968-1966) provides exemption from customs and all other duties for foreign aircraft taking on board fuel and other consumable supplies.



2. During the still pending negotiations on a new bilateral air transport agreement both delegations achieved consensus on a new article 9, which, in extension of Article 7 of the bilateral air transport agreement of 1955, would grant reciprocal exemptions from national taxes for all purchases of aviation fuel. Both Contracting Parties would use their best effort to secure exemption of the said taxes imposed by state, regional or local authorities.

3. In the Federal Republic of Germany, foreign airlines are exempt from taxes on the purchase of fuel. Should the tax imposed by the State of Florida be upheld, the reciprocity in relation to the exemption existing in the Federal Republic of Germany would be jeopardized.

4. The State of Illinois, apparently encouraged by the judgment of the Florida Supreme Court, already imposed a similar "Retailers' Occupation Tax". Should the judgment of the Florida Supreme Court be confirmed, numerous States of the Union might follow suit. This would disrupt a longstanding worldwide practice established to prevent discrimination and to facilitate the operation of international air services.

5. State taxes on international aviation would prevent the United States to speak with one voice in an important are of foreign trade. This would impede international trade and may be contradictory to the Import-Export Clause of the Constitution of the United States.

The Embassy of the Federal Republic of Germany avails itself of this opportunity to renew to the De-

partment of State the assurance of its highest consideration.

Washington, 29 November 1984



EMBAJADA DE LA REPUBLICA DE HONDURAS
WASHINGTON, D.C. 20008

November 7, 1984

No. 118-84 EHW/DE

Excellency:

I have the honor to address Your Excellency with respect to the matter of the aviation fuel taxes that have been imposed on international airlines by the State of Florida.

As Your Excellency may know, the established international consensus favors reciprocal exemption from taxes, which is expressed in Article 24 of the Chicago Convention, as well as in ICAO resolution document 8632-C/968.

The Honduran Civil Aeronautic Code contemplates that foreign airlines may introduce, for their own use, duty free fuel and lubricants providing that the Honduran airlines are treated in a reciprocal manner abroad. Since the Republic of Honduras does not have a federal structure, a true reciprocity on the part of the United States would require exemption from taxes at both federal and state levels.

The imposition of fuel taxes by the State of Florida, as well as similar taxes imposed by other local jurisdictions in the United States, could produce retaliatory measures by other foreign governments. This action would be detrimental to the overall development of international aviation and at the same time create administrative, legal, and economic problems.

At the present time, many airlines are facing financial difficulties and these fuel taxes represent a

serious economic challenge for them, which could provide an extra burden on passengers and shippers who use their services.

Excellency, as it is understood that this case will soon be presented to the United States Supreme Court by a group of international airlines, on behalf of my Government I kindly request your cooperation in obtaining the support of the United States Government before the Supreme Court in favor of the principle of reciprocal fuel tax exemption treatment.

Accept, Excellency, the assurances of my highest consideration.

/s/ Juan Agurcia
JUAN AGURCIA
Ambassador



EMBASSY OF ICELAND
2022 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20008

The Embassy of Iceland presents its compliments to the Department of State and has the honor to request assistance in the following matter.

On several occasions the Embassy of Iceland has had the opportunity to express to you Iceland's concern over the continuing failure of the Illinois Department of Revenue to grant to Icelandair (the designated flag carrier of Iceland, partially owned by the government of Iceland) an exemption from Illinois sales and use taxes. Illinois legislation exempts sales to governmental bodies, and the Department of Revenue Rule 40 had confirmed that exemption. Recently, the Illinois Department of Revenue proposed to eliminate such exemption with respect to those foreign air carriers enjoying its benefit, and Iceland again objected. The Illinois Department of Revenue has now in fact eliminated the Rule 40 exemption and is now assessing its sales and use tax against foreign air carriers, regardless of the level of governmental ownership. The City of Chicago continues to levy its local taxes as well. As we have expressed to you, this local taxation is contrary to the tax treaties between the United States of America and Iceland, and is not in the best interest of foreign commerce between our nations.

We have learned that a recent State of Florida Supreme Court decision upheld that state's fuel tax on international aviation. We understand that the carriers involved have appealed to the United States Supreme Court in the case entitled "*Lineas Aereas Costarricenses, S.A.* (*LACSA*), *et al. v. Department*

*of Revenue, State of Florida*". Although the Republic of Iceland is not directly involved as a litigant, we have noted with great interest that the Illinois Department of Revenue, in support of its successful proposal to eliminate the Rule 40 exemption, relied heavily on this Florida decision. In addition, because Icelandair recently has inaugurated a service into Orlando, Florida, Iceland considers it appropriate to express to you, and to request your assistance in presenting, The Republic of Iceland's support of appellant LACSA and its opposition to the imposition of local taxes on international air traffic.

The history of agreements and treaties between The Republic of Iceland and the United States of America relating to the commerce between our two nations has been characterized by mutual cooperation toward a common goal, a stable economic environment:

(a) The Air Transport Agreement of 1945, based on the International Civil Air Conference held in Chicago, Illinois of 1944, exempted aircraft fuel from import custom duties and use or consumption duties for flights into or over our respective nations.

(b) In 1962, an Agreement was entered into granting relief for double income taxation on the earnings from the operation of ships and aircraft operated under the laws of our respective nations.

(c) In 1975, a Convention was entered into for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital of our citizens and the businesses of our respective nations. Article 10 of the Convention specifically exempted from income taxation the "operation in international traffic of ship or aircraft" registered in our respective nations. In addition, pursuant to Article 17, Iceland agreed that its national capital tax, which has no counterpart in the United States Federal Tax Codes, would not be levied against ships, aircraft and other assets pertaining to the operation of such ships and aircraft.



(d) Lastly, on November 6, 1984, the United States Treasury Department certified the Iceland's exchange of information program for the new Foreign Sales Corporation provisions of The United States of America Tax Reform Act of 1984. We understand that these provisions may further strengthen the economic ties between our two nations.

The Republic of Iceland is concerned that its ability to function economically under its international tax and trade agreements with the United States of America has been, and may continue to be, threatened by the actions taken by local taxing authorities in the United States of America:

(1) Both The Republic of Iceland and the United States of America intended that the Agreements and Treaties would promote trade and commerce. However, as long as individual States and other local authorities assess taxes on the international commercial operations of Icelandair and other foreign carriers, such operations become more expensive. Indeed, if international air carriers such as Icelandair are forced to seek destinations in the United States of America based in any way upon considerations of local taxation of operational essentials such as aviation fuel, the States imposing such taxes, such as Florida and Illinois, may lose the sizeable financial benefits to local, state and regional commerce which naturally result from such international traffic.

(2) Local taxation of international commerce is inconsistent with and violates the reciprocity intended by our Agreements and Treaties. Local taxation prevents the Government of the United States of America from uniformly conducting its relationships with foreign governments. This lack of continuity undermines those relationships.

The Republic of Iceland hereby formally requests that The United States of America consider filing an *amicus curiae* brief in opposition to the State of Florida taxation of aviation fuel used in international aviation. We understand that such brief must be filed prior to January 10, 1985, which we understand is the current deadline.

The Embassy of Iceland avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C.
December 18, 1984.



EMBASSY OF ISRAEL
WASHINGTON, D.C.

The Embassy of Israel presents its compliments to the Department of State and has the honor to request its assistance in the following matter.

In June 1984, the Supreme Court of the State of Florida held in a lawsuit involving Lineas Aereas Costarricenses and eleven other foreign carriers ("LACSA litigation") that the State's 5.7 cents per gallon sales tax on aviation fuel is valid. According to information given to the Embassy of Israel, the decision of the Florida Supreme Court is being appealed to the United States Supreme Court.

The Government of Israel wishes to express its strong concern with respect to the decision of the Florida Supreme Court. In addition, the Government of Israel wishes to express its interest in the outcome of the LACSA litigation in the United States Supreme Court.

El Al Israel Airlines Limited ("El Al") is the flag carrier of the State of Israel and is over 99% owned by the Government of Israel. El Al has been designated in accordance with the terms of the Air Transport Agreement between the U.S.A. and Israel, 13.6.1950, and the Protocol relating to the said Agreement of 16.8.1978, and foreign air carrier permits issued by the United States Civil Aeronautics Board, to conduct international flight operations between Miami and foreign points. El Al has in the past engaged and may in the future engage in operations into and from Miami. While the LACSA litigation directly concerns only aviation fuel taxes imposed by the State of Florida, it also has wider im-

plications for international airlines, such as El Al, that serve the United States.

It is the view of the Government of Israel that taxes such as the Florida aviation fuel tax on foreign carriers are in conflict with the principle that international air carriers should be exempt, [a] principle [that] has, for many years, been well established by international treaties and agreements to which the United States is a party.

The United States and the State of Israel are signatories to the Convention on International Civil Aviation (Chicago Convention). Article 24 of the Chicago Convention provides that fuel and aircraft stores on board an aircraft of a contracting state shall be exempt from customs duty, inspection fees or similar national or local duties and charges in the contracting states.

In addition, the International Civil Aviation Organization ("ICAO"), adopted on November 14, 1966, a Council Resolution, in furtherance of Article 24 of the Chicago Convention, which enunciates ICAO's policies on taxation in the field of international air transport and which provides, in part, that when an aircraft registered in one state departs from an international airport of another state, the fuel and other consumable technical supplies taken on board for consumption during the flight shall be exempt from all customs and other duties. The definition of "customs and other duties" set forth in that Council Resolution includes sales, consumption and internal duties and taxes of all kinds levied upon fuel by any taxing authority within a state. The United States has in general accepted the principles enumerated in the ICAO Council Resolution and does not itself impose any such charges. However, some states in the United States, for example, Florida, do



impose such charges. The Government of Israel considers taxes such as the Florida aviation fuel tax to be inconsistent with the aforementioned Resolution.

Moreover, paragraph (c) of Article IV of the Air Transport Agreement of June 13, 1950, between the United States and Israel provides that fuel and aircraft stores retained on board civil aircraft of the designated airline of one contracting party shall be exempt from customs, inspection fees or similar duties or charges in the territory of the other contracting party. This provision is not confined to national charges. It demonstrates the understanding as [between] our two countries of the need for reciprocal exemption from taxes on civil aviation, which would be seriously undermined by the imposition of local fuel taxes by any state of the United States.

Pursuant to paragraph (g) of Article 10 of the 1978 Protocol to the Air Transport Agreement, each party agrees to use its best efforts to secure for the designated airlines of the other party, on a reciprocal basis, an exemption from taxes, charges and fees imposed by state, regional and local authorities on, among other things, aircraft fuel and stores. The State of Israel has no taxes similar to taxes such as the Florida aviation fuel tax. Thus, American-owned airlines operating to and from Israel are granted full exemption from purchase-taxes similar to those imposed by the State of Florida.

The Government of Israel wishes to affirm its position that exemption from taxation on aviation fuel is granted on a basis of reciprocity and would consider the Florida sales tax a deviation from that principle.

It is, therefore appropriate for the State of Israel to request that the United States support the posi-

tion of the international airlines in the LACSA litigation and that the Department of State undertake to transmit the concerns of the State of Israel to the United States Supreme Court.

Dec. 5, 1984



AMBASCIATA D'ITALIA
WASHINGTON, D. C.

The Italian Embassy presents its compliments to the Department of State and wishes to draw its kind attention on the following matter.

Since April 1, 1983, the State of Florida has been applying a five percent sales tax on jet fuel purchased within the State, even by foreign carriers. It seems that the State of Illinois is also about to impose the same amount of tax on fuel purchases, even though foreign carriers have made juridical appeal against the Florida decision and are awaiting the decision of the Supreme Court of the U.S.

Article 3 of the current Civil Aviation Agreement, [like] those signed with many other European countries and Japan, guarantees on the basis of reciprocity the total exemption from import duties, charges and any other tax applied on fuels.

The Italian Embassy understands that the above agreement has not been ratified by the U.S. Senate and that, consequently, the single States maintain their right to autonomously apply such sales taxes in their territories. However, the Memorandum of Understanding, signed by the U.S. Government with various countries aimed at rectifying the conflict of interests between the Federal Government and the States of the Union, guarantee to the countries which signed the Memorandum the U.S. government's support and the application of the non-discriminatory clause (Most Favorite Nation).

In view of the above, and since Italy does not apply any sales taxes to U.S. aircraft re-fueling in Italy, the Italian Government would appreciate it if the Department of State would use its good offices in

order that the appropriate U.S. authorities will rectify the situation as soon as possible.

The Italian Embassy welcomes the opportunity to renew to the Department of State the expressions of its highest esteem and consideration.

Washington, D.C.
October 2, 1984



EMBASSY OF JAPAN
WASHINGTON

January 11, 1985

The Embassy of Japan presents its compliments to the Department of State and, with regard to the recent development in the state of Florida in imposing a tax of 5.7 cents per gallon on aviation fuel sold and loaded in the state for the purpose of international air transportation from April 1983, wishes under instruction from its home Government, to request the Government of the United States to take appropriate measures so that the fuel for use in international air transportation in the state of Florida will be exempted from tax in view of the following points:

(1) Article 6 of the Civil Air Transportation Agreement between Japan and the United States holds that both parties shall be exempted from sales tax on such goods as fuel and lubricating oils for the use in international air transportation purchased and loaded in the other party's territory on the basis of reciprocity;

(2) In the resolution of the International Civil Aviation Organization (ICAO), it is provided that such a fuel tax as that by the state of Florida should be eliminated on the basis of reciprocity. Therefore, the Government of Japan regards such taxation by the state of Florida as inconsistent with this Resolution;

(3) The Government of Japan believes that in encouraging development of an international exchange of people and commerce, it has become an internationally established practice to exempt [from] tax fuel used for the purpose of international air transport.

The Government of Japan wishes to point out that Florida's sales tax on such fuel impedes the sound development of international transportation.

Moreover, the Embassy wishes to call to the attention of the Department of State a similar appeal made on December 9, 1983, in response to the imposition of a similar kind of sales tax by the state of Illinois, and further to the action of Latin American airlines challenging the right of the state of Florida to impose such a tax through a lawsuit, which is currently under review by the United States Supreme Court.

The Embassy avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.



[EMBASSY OF MEXICO]

[*Unofficial Translation*]

The Embassy of Mexico presents its compliments to the Department of State and would like to call its attention to the following matter.

The State of Florida established a tax of 5.7 cents per gallon on all aviation fuel sold in its territory from April 1st. 1983 onwards. For this reason, a group of airlines, including Mexicana and Aeroméxico, brought the case to a State court which ruled that foreign air-freighters operating in the State of Florida should be exempted from the aforementioned fuel-tax. However, the administrative State Government authorities of Florida appealed this decision to the State Supreme Court, which reversed the lower court ruling, endorsing the right to levy taxes on the fuel used by international airlines. Consequently, the airlines affected decided to appeal to the Supreme Court of the United States. The case is known as "Líneas Aéreas de Costa Rica, S.A. (LACSA) et al. vs. Department of Revenue, State of Florida."

This Embassy would like to express the serious concern of the Government of Mexico over this situation, since it is of the opinion that the decision made by the State of Florida is in disagreement with the contents of article 7 of the Agreement in force between the Governments of the United Mexican States and the United States of America on the subject of air-transportation. This measure is also inconsistent with the provisions of the Chicago Convention and the resolutions of the International Civil Aviation Council, specifically that of November 4, 1966 (ICAO document 8632-C/968). Moreover, this Embassy considers that if the legality of the fuel-tax levied by

the State of Florida were to be sanctioned, this would result in problems of multiple taxation.

Because of the aforementioned reasons, the Embassy of Mexico request, through the mediation of the Department of State, the support of the Government of the United States for the case of the airlines in question to be tried by the Supreme Court of Justice, suggesting for this purpose to use an *amicus curiae* procedure. It is the understanding of this Embassy that the deadline for the Department of Justice to act as *amicus curiae* would be January 10, 1985.

The Embassy of Mexico avails itself of this opportunity to convey to the Department of State the assurances of its kind consideration.

Washington, D.C. December 11, 1984.



[EMBASSY OF THE NETHERLANDS]

EA-14184

The Royal Netherlands Embassy presents its compliments to the Department of State and has the honour to request the Department's attention to the following.

The State of Florida imposed, effective April 1, 1983, a tax of 5.7 cents per gallon on all aviation fuel sold within its jurisdiction. Under this legislation, all fuel purchased in Florida is taxable, even if it is consumed outside of that state or, indeed, outside of the United States.

Lineas Aereas Costarricenses, S.A. and other foreign air carriers from the Caribbean and Central and South America filed a lawsuit in the Florida courts challenging the legality of this Florida state tax under the United States Constitution. On June 1, 1983, the court before which the initial hearings on this lawsuit were held issued a decision concluding that foreign carriers serving Florida must be exempted from this tax. The State of Florida appealed this decision to the Florida Supreme Court, which on June 14, 1984 reversed the lower court's determination and held that imposition of the tax on international airlines is proper. The plaintiffs have appealed the decision of the Florida Supreme Court to the United States Supreme Court.

The Royal Netherlands Embassy wishes to inform the Department of State of the grave concern of the Netherlands Government with regard to the aforementioned imposition of an aviation fuel tax by the State of Florida on international aviation. In this context, the Government of the Netherlands would

like to observe that said tax is inconsistent with the Air Transport Agreement between the Government of the United States of America and the Government of the Kingdom of the Netherlands of April 3, 1957, Article 7 (d) of which states that "fuel, lubricating oils, other consumable technical supplies, spare parts, regular equipment, and stores taken on board aircraft of the airlines of one Contracting Party in the territory of the other and used in international services shall be exempt on a basis of reciprocity from customs duties, excise taxes, inspection fees and other similar national duties, taxes and charges, even though such supplies be used or consumed by such aircraft on flights in that territory".

The Netherlands Government is of the opinion, furthermore, that the referred Florida state tax is contrary to the established international standard of reciprocity. More specifically, reference may be made to the Resolution of the Council of the International Civil Aviation Organization of November 14, 1966, in particular Section I, paras. 1 and 4 thereof, which stipulate that "when an aircraft registered in one State departs from an international airport of another State either for another customs territory of that latter State of for the territory of any other State, the fuel, lubricants and other consumable technical supplies taken on board for consumption during the flight shall be furnished exempt from all customs and other duties". "The expression 'customs and duties' shall include import, export, excise, sales, consumption and internal duties of all kinds levied upon fuel, lubricants and other consumable technical supplies by any taxing authority within a State".

The Netherlands Government has consistently manifested its opposition to any infringement of the principle that international aviation should be exempted from taxes or other impositions. The Florida state tax under reference, if maintained, would not only be highly undesirable in itself from this point of view, but would, moreover, constitute a precedent for possible similar action by other foreign governments.



The Netherlands Government has been informed that the aforementioned plaintiffs will soon present their case to the United States Supreme Court. For the reasons set out above, the Netherlands Government urges the Government of the United States to give formal support to the position of the plaintiffs in this litigation by filing an *amicus curiae* brief to that effect with the United States Supreme Court. It is the understanding of the Netherlands Government that the deadline for submission of said brief in this case is presently set at January 10, 1985.

The Royal Netherlands Embassy, whilst thanking the Department of State for its attention to this important matter, avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C.
December 3, 1984

ROYAL NORWEGIAN EMBASSY
WASHINGTON, D.C.

The Royal Norwegian Embassy, acting also on behalf of the Royal Danish Embassy and the Swedish Embassy, presents its compliments to the Department of State, and has the honour to draw the attention of the Department to the following matter:

The State of Florida on 1 April 1983 imposed a 5.7 per cent sales tax within the territory of its jurisdiction on jet fuel purchased by foreign airlines for international transport. The legality of this decision has since been challenged by a number of foreign airlines serving the US market, and the matter has been appealed to the United States Supreme Court with a request to review and reverse the decision of the State Government.

Already the action taken by the State of Florida has been referred to as a precedent by other local jurisdictions within the United States, contemplating similar measures with regard to taxation of foreign airlines.

The Governments of Denmark, Norway and Sweden have noted these developments with a growing concern. The three governments would in this context like to underline that American-owned airlines, as well as other foreign owned airlines, operating routes to and from Denmark, Norway and Sweden are in these countries granted full exemption from taxes and duties on similar purchases of fuel for international transport.

Such measures as taken by the State of Florida will not only be detrimental to the overall development of international aviation, but would also jeopardize the international consensus and standards of



reciprocity in this field, as well as the equilibrium of the taxation regime for civil aviation as now applied between our respective countries.

A further reason for the concern of the Scandinavian Governments is the possible effect such an action might have on other countries which might follow suit, with the ensuing apparent risk of seriously damaging the fundamental principles of avoidance of double taxation of air transport companies.

The Governments of Denmark, Norway and Sweden would therefore like to express their strong concern with regard to these measures, and urge the Government of the United States to use its good offices in order that the appropriate authorities will rectify the situation.

The Royal Norwegian Embassy avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C., 11 December, 1984.

No. 106/84

EMBAJADA DE PANAMA
WASHINGTON, D.C. 20008

E.P.E.A.U. - 507 D

December 12, 1984

The Embassy of Panama presents its compliments to the Honorable Department of State and has the honor to refer to the aviation fuel taxes that have been imposed on international airlines by the State of Florida through its Senate Bill 8A, which was made effective on April 1, 1983.

The Government of Panama is deeply concerned with this matter, as the proposed taxes fall within Article III, Paragraph C of the Agreement on Air Transport Services Between the United States of America and the Republic of Panama, which was signed at Panama on March 31, 1949, which clearly indicates the following:

> "The fuel, lubricating oils, spare parts, regular equipment and aircraft stores retained on board civil aircraft of the airlines of one contracting party authorized to operate the routes and services described in the annex shall, upon arriving in or leaving the areas with respect to which the other contracting party has jurisdiction, be exempt from customs, inspection fees or similar duties or charges, even though such supplies be used or consumed by such aircrafts on flights in those areas."

On the other hand, the established international consensus favors reciprocal exemption from taxes, which is expressed in Article 24 of the Chicago Convention. Also, aviation fuel taxes such as those im-



posed by the State of Florida create a substantial risk of international multiple taxation, and particularly, retaliatory measures by other nations. At the present time many international airlines are facing severe financial difficulties, and the fuel taxes will represent a serious economic burden for them.

Being that many airlines have appealed this decision to the United States Supreme Court, the Embassy of Panama would appreciate very much if the Honorable Department of State would support the position of these airlines by an "Amicus Curiae" brief to the United States Supreme Court.

The Embassy of Panama avails itself of this opportunity to renew to the Honorable Department of State the assurances of its highest consideration.

SPANISH EMBASSY
WASHINGTON, D.C.

No. 301

The Embassy of Spain presents its compliments to the Department of State and has the honor to refer to the State of Florida Senate Bill 8A, about the introduction of a Tax concerning fuel purchased by airlines.

The Government of Spain considers that the proposed taxes fall within Article 7 of the Air Transport Agreement between the Government of the United States of America and the Government of Spain of August 3rd, 1973. In particular Article 7(d) states that "Fuel, lubricating oils, other consumable technical supplies, spare parts, regular equipment, and stores taken on board aircraft of the airlines of one contracting party in the territory of the other and used in international services shall be exempt on a basis of reciprocity from customs duties, excise taxes, inspection fees and other similar national duties, taxes or charges, even though such supplies be used or consumed by such aircraft on flights in that territory". This paragraph covers the taxes listed in the Notice of Proposed Amendment—which accordingly are not consistent with the Air Transport Agreement.

The Government of Spain may also refer to the Resolution of November 14, 1966 of the Council of the International Civil Aviation Organization. In particular Section 1, paragraphs 1 and 4 state that:

> "When an aircraft registered in one State departs from an international airport of another State either for another customs territory of that latter State or for the territory of any other



> State, the fuel, lubricants and other consumable technical supplies taken on board for consumption during the flight shall be furnished exempt from all customs and other duties".

"The expression 'customs and other duties' shall include import, export, excise, sales, consumption and internal duties of all kinds levied upon the fuel, lubricants and other consumable technical supplies by any taxing authority within a State". Consequently, the proposals of the State of Florida are inconsistent with the aforementioned Resolution.

The Government of Spain therefore request that the Department of State urge the State of Florida to reconsider its proposals in the light of the United States obligations and commitments.

The Embassy of Spain avails itself of this opportunity to renew to the Department of State the expression of its highest consideration.

Washington, D.C., November 30th, 1984

[EMBASSY OF SWITZERLAND]

The Embassy of Switzerland presents its compliments to the Department of State and has the honor to refer to the recent amendment of the tax law of the State of New York about franchise taxes on transportation corporations.

This new legislation, amending the tax law, will impose on airlines serving the State of New York a tax on capital stock and gross earnings, thus removing the long-standing exemption from such tax granted to foreign airlines as Swissair. The Swiss authorities are concerned about such taxation of Swissair which would be a considerable departure from the worldwide accepted principle that enterprises should be taxed only by the State in which the management of the enterprise actually is located. It would also be contradictory to the ICAO policies on taxation in the field of international air transport stated in the Resolution on taxation of the income of international air transport enterprises and on taxation of aircraft adopted by the Council of ICAO on November 14, 1966 (ICAO Doc 8632-C/968 Section III). Clause No. 1 of this Resolution provides that Contracting States shall, to the fullest possible extent, grant reciprocally exemptions from taxation on the income, property taxes and capital levies or other similar taxes.

The introduction of the new tax would be likely to cause serious problems for the aviation industry and set off a chain reaction around the world which would but add to the present difficulties of the industry.

Finally, the Swiss authorities wish to draw the attention of U.S. authorities to the fact that the fran-



chise tax of the State of New York could have the effect that different Cantons (States) of Switzerland may take the necessary steps to introduce a similar tax to counter-balance the New York legislation.

In view of the foregoing, the Swiss authorities appreciate the consideration the Department of State will give to this matter. They ask the Department of State to kindly transmit the content of this note to the competent authorities of the State of New York. The Swiss authorities trust that the tax exemption for air carriers will be restored as was done for the shipping companies.

The Embassy of Switzerland avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C.,
March 3, 1982

Nos. 84-902, 84-922 and 84-1041

In The

Supreme Court of the United States

October Term, 1985

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Wardair Canada Inc., Appellant

v.

Florida Department of Revenue

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Lineas Aereas Costarricenses, S.A., et al., Appellants

v.

Florida Department of Revenue

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Air Jamaica Limited, et al., Appellants

v.

Florida Department of Revenue

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On Appeal From

The Supreme Court of Florida

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# Appellee's Reply Brief to Amicus Curiae

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TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## POINTS I AND II

POINT I. THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION BECAUSE ALL ISSUES RAISED BY THE AMICUS HAVE BEEN FORECLOSED BY PRIOR DECISIONS OF THIS COURT.

POINT II. THE DECISIONS OF THE SUPREME COURT OF FLORIDA ARE CONSISTENT WITH PRIOR DECISIONS OF THIS COURT ON THE INVOLVED ISSUES OF LAW, MANY OF WHICH ARE CITED IN THE SUPREME COURT'S DECISIONS, AND IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISIONS IN THIS CAUSE DEPENDS, ARE SO INSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

A. THE FLORIDA SUPREME COURT'S DECISIONS ARE CONSISTENT WITH THIS COURT'S DECISION IN JAPAN LINE, LTD. V. COUNTY OF LOS ANGELES, 441 U.S. 434 (1979).

B. NONE OF THE AIR TRANSPORT INTERNATIONAL AGREEMENTS EXEMPT FOREIGN AIRLINES FROM IMPOSITION OF A STATE EXCISE TAX ON THE PURCHASES OF FUELS IN A STATE OF THE UNITED STATES.

## DISCUSSION

These cases do not present a substantial federal question concerning the power of a state to levy an excise tax imposed upon the privilege of engaging in the business of selling tangible personal property which includes

aviation fuel (See 84-921, A.C. 7). The decisions of the Supreme Court of Florida are consistent with prior decisions of this Court in the Guarantee Trust Co. v. United States, 304 U.S. 126 (1938); United States v. Pink, 315 U.S. 203 (1942); Hines v. Davidowitz, 312 U.S. 52 (1941); Container Corp. of America v. Franchise Tax Board, 463 U.S. 159 (1983) and Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979).

The Amicus contends that the instant decisions of the Florida Supreme Court and thus Florida's excise tax, are inconsistent with federal policy as it relates to the taxation of aviation fuel purchased by foreign airlines, while in the United States, and this Court's decision in Japan Line. Based on those premises, Amicus argues that Florida's tax should be declared



unconstitutional as applied.

In Japan Line, this Court set forth two additional requirements to the "four prong" test referred to in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), reh. den. 430 U.S. 976. The first was whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and second whether the tax prevents the federal government from "speaking with one voice when regulating commercial re-- lations with foreign governments." The decisions of the Florida Supreme Court are consistent with the Japan Line and meets both of the additional tests.

As stated by Amicus (See 84-902, A.C. 30), the "multiple taxation" aspect of Japan Line is not a concern in the instant cases. Appellants did not prove - indeed they have not argued - that Florida's sales tax on aviation fuel

"produces multiple taxation in fact" (Japan Line, 441 U.S. at 452). Additionally Amicus did not think that Florida's sales tax "creates a substantial risk of international multiple taxation" (id. at 451)(See 84-902, A.C. 30). The decisions of the Florida Supreme Court are consistent with these observations.

However, Amicus nevertheless suggests that Florida's excise tax, prevents the United States from speaking with one voice thus it fails to meet the second test in Japan Line, and thus is unconstitutional as applied.

First, it should be pointed out that Amicus' statement that fuel should be likened to the containers involved in Japan Line is incorrect. The containers in Japan Line were in fact instrumentalities used for shipping property into the United States.



The containers would be likened to the aircraft themselves and not to the fuel which is consumed by the aircraft in flying into the United States. Thus, Amicus' statement that the fuel is an instrumentality of commerce is totally incorrect. Furthermore, Amicus is incorrect in stating that Florida imposes a tax on aviation fuel. This is not true. Florida's tax is an excise tax imposed upon the privilege of engaging in the business of selling tangible personal property which includes fuel (See 84-921, A.C. 7). The excise tax is imposed on the vendor or dealer and is a privilege tax not a property tax as suggested by Amicus, and which was before this Court in Japan Line. Florida's excise tax on the privilege of engaging in business is totally dissimilar from the ad valorem property tax imposed on the

property itself, in that case, the containers.

Second, contrary to Amicus' contention, Florida's tax does not create an asymmetry in the international tax structure which operates automatically to foreign nations' disadvantage. Amicus leaves the impression that prior to 1983, Florida granted foreign airlines a proration of the tax which was not granted to domestic airlines in international commerce (See 84-902, A.C. 18). In fact, at that time both foreign and domestic airlines, operating over international routes, and traveling only briefly in Florida's airspace, were granted the proration on a mileage basis. With the abolishing of the proration of the - tax on the aviation fuel purchased by either domestic or foreign airlines, both foreign and domestic airlines continue



to be treated equally by Florida. Today, as in the past, Florida provides equal, symmetrical treatment to foreign and domestic airlines in this taxation of sales of fuel purchased in Florida.

It is therefore incorrect to say that the Florida tax "operates automatically to foreign nations' disadvantage." This is a pure sales tax imposed upon the privilege of engaging in the business of selling tangible personal property which includes aviation fuel, irrespective of its use, whether in domestic or foreign commerce. The incident upon which the tax is imposed occurs prior to any commitment of the aviation fuel to any commerce, foreign or domestic. The tax is clearly neutral in its treatment of foreign airlines. It is therefore consistent with the federal policy of nondiscriminatory treatment of foreign

airlines.

Third, Florida's tax is not contrary to the expressed federal policy nor does it impermissibly implicate foreign affairs. In analyzing this tax and foreign affairs, an examination must be made of the "one voice" doctrine. Florida contends that its tax does not interfere with the authority of the United States to regulate commercial relations with foreign governments.

In the international compacts (See 84-902, A.C. 10-16), the federal policy expressed is a spirit of equality of opportunity and treatment. The ICAO's Resolution (See 84-902, A.C. 11), passed under the Chicago Convention on International Civil Aviation, implements the Convention's purpose: to avoid discrimnation against airlines among contracting states. The Convention, as Amicus states (See 84-902, A.C. 10) exempts only aviation fuel and supplies which are "on board an aircraft." The Resolution, by extending this practice to include state taxes on sales of fuel and supplies was in furtherance of assuring "equitable treatment for international aviation" (84-902, A.C. 12). The Florida tax is certainly consistent with equality of treatment and it is consistent with federal policy as expressed in the international compacts.



While Amicus states that the international compacts "differ in subtle ways" (84-902, A.C. 34), it can be stated without equivocation that the agreements do <u>not</u> expressly preempt state taxes, such as the Florida tax involved in the instant case. (84-902, A.C. 17 and 32).

Federal policy is enunciated by its expression in the official international compacts. This federal policy expresses a pattern, by these international compacts, which falls short of any prohibition upon state taxation of aviation fuel purchased by foreign airlines. Clearly, in this area, the federal government has spoken with one voice to accomplish equality of treatment.

The Amicus is requesting this Court to ignore these international compacts and the expressed federal policy by asking this Court to amend or rewrite these agreements to include an exemption from state excise taxes.

The federal government's "one voice" has spoken, and it says to treat all airlines equally, in every respect and to make sure there is no discrimination in favor of domestic



airlines against the foreign airlines. The Florida tax does not violate this federal policy. The outcome of this case should indeed be dictated by this federal policy and as enunciated in the particular compacts, which in their "idiosyncratic provisions" have set forth a federal policy which places no restrictions on the state's power to impose a nondiscriminatory tax, such as Florida's, upon the privilege of engaging in the business of selling tangible personal property which includes aviation fuel.

## CONCLUSION

Based on the foregoing reasons, the Appellee urges the Court to grant its Motion to Dismiss the appeal or to affirm the decisions of the Supreme Court of Florida. These appeals do not present a substantial federal

question as the decisions of the Supreme Court of Florida are consistent with prior decisions of this Court, and it is manifest that the questions on which the decisions in these cases depends are so insubstantial as not to need further argument.

Respectfully submitted,

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No. 84-902

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

WARDAIR CANADA INC.,

*Appellant,*

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

*Appellee.*

On Appeal From The Supreme Court of Florida

# BRIEF FOR APPELLANT

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## QUESTION PRESENTED

This case presents the question decided in *Japan Line, v. County of Los Angeles,* 441 U.S. 434 (1979), but is different in that the state tax involved not only violates the "one voice" standard by implicating nationally important foreign policy issues, but also violates a clear "directive" of Congress. The question presented by this appeal is:

Whether the imposition by Florida of an unapportioned fuel tax on an instrument of foreign commerce, aviation fuel,pumped from Florida based storage facilities into the aircraft of a foreign national for use as a propellant of such aircraft which are owned, based and registered abroad, and operated exclusively in international commerce is in violation of:

1. the Commerce Clause of the Constitution of the United States, Article I, Section 8, Clause 3,

2. the Supremacy Clause of the Constitution of the United States, Article VI, Clause 2, and

3. the Nonscheduled Air Services Agreement between the Government of the United States of America and the Government of Canada, TIAS 7826, 25 UST 787 (May 8, 1974).

## PARTIES

The parties are those named in the caption.* However, the Solicitor General on behalf of the United States filed an *Amicus Curiae* Brief in support of Appellant's Jurisdictional Statement.

Pursuant to Supreme Court Rule 28.1, Appellant sets forth its parent company, and subsidiary (except its wholly owned subsidiary) and affiliate corporations, as follows: Wardair International Ltd. (the parent company), International Vacations Ltd., Wardair Leasing Inc., Wardair Equipment Ltd., Wardair Hawaii Limited, Wardair (U.K.) Ltd., Wardair Holidays (Deutschland) GmbH, and Wardair (France) S.A.R.L.

* There were many foreign air carriers that challenged on Constitutional grounds the imposition of the Florida fuel tax on aviation fuel used in foreign commerce in other cases. See, U.S. Sup. Ct. Nos. 84-922, 84-1041.



## TABLE OF CONTENTS

JURISDICTIONAL STATEMENT APPENDIX

## TABLE OF AUTHORITIES





**Table of Authorities Continued**

**Table of Authorities Continued**





**Table of Authorities Continued**

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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**84-902**

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WARDAIR CANADA INC.,
*Appellant,*

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
*Appellee.*

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**On Appeal from the Supreme Court of Florida**

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## BRIEF FOR APPELLANT

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### OPINIONS BELOW

The opinion of the Florida Supreme Court is reported at 455 So. 326 (Fla. 1984), and is reproduced as Appendix A in the Appendix to Appellant's Jurisdictional Statement.[1] J.S.A. at A-1 —A-7. The final judgment and opinion of the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida,

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[1]On December 2, 1985, the Court granted Appellant's motion to dispense with printing a Joint Appendix. Instead, the Appendix which accompanied Appellant's Jurisdictional Statement will be used. That Appendix will be referred to hereinafter as "J.S.A."

is not reported. It is reproduced as Appendix C in the Appendix which accompanied Appellant's Jurisdictional Statement. J.S.A. at A-21 –A-24.

## JURISDICTION

The judgment of the Florida Supreme Court was entered on June 14, 1984. J.S.A. at A-1 –A-6. Appellant filed its Jurisdictional Statement on December 5, 1984, contesting the decision of the Florida Supreme Court upholding the constitutionality of a state imposed fuel tax on the grounds, that the state fuel tax legislation violates the United States Constitution to the extent it taxes the jet fuel pumped from Florida based facilities into the aircraft of an air carrier of a foreign nation to be used in that aircraft as a propellant in foreign commerce exclusively. This Court noted probable jurisdiction on November 4, 1985. The jurisdiction of this Court is involved under 28 U.S.C. sec. 1257(2).

## CONSTITUTIONAL, STATUTORY, AND INTERNATIONAL AIR TRANSPORT AGREEMENT PROVISIONS INVOLVED

This case raises questions concerning the validity of certain provisions of Senate Bill 8A, Chapter 83-3, Laws of Florida, under the Commerce and Supremacy Clauses of the United States Constitution, Article I, Section 8, Clause 3 and Article VI, Clause 2, respectively, and the Nonscheduled Air Services Agreement between the United States and Canada of May 8, 1974, TIAS 7826, 25 UST 787.

The applicable provisions of The Constitution of the United States of America are:



> "Congress shall have Power . . . To regulate Commerce with foreign Nations . . . ." U.S. Const. Art. I, sec. 8, cl. 3.

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2.

Relevant provisions of Florida Senate Bill 8A, are presented in S.J.A. at A-42 –A-47.

Relevant provisions of the Nonscheduled Air Services Agreement between the United States and Canada are contained in S.J.A. at A-48 –A-67.

Convention on International Civil Aviation (The Chicago Convention), 61 Stat. 1180, TIAS 1591 (signed Dec. 7, 1944, ratified by U.S. Aug. 9, 1946, effective April 4, 1947), Article 24(a):

> "Aircraft on a flight to, from, or across the territory of another contracting State shall be admitted temporarily free of duty, subject to the customs regulations of the State. Fuel, lubricating oils, spare parts, regular equipment and aircraft stores on board an aircraft of a contracting state, on arrival in the territory of another contracting State and retained on board on leaving the territory of that State shall be exempt from customs duty, inspection fees or similar national or local duties and charges . . . ."

Relevant sections of the Federal Aeronautics Act of 1958, as amended, 49 U.S.C. sec. 1301, *et seq.*, are as follows:

Section 402, 49 U.S.C. sec. 1372 are:

"(a) No foreign air carrier shall engage in foreign air transportation unless there is in force a permit issued by the Board authorizing such carrier so to engage.

* * *

"(e) The Board may prescribe the duration of any permit and may attach to such permit such reasonable terms, conditions, or limitations as, in its judgment the public interest may require."

Section 801, 49 U.S.C. sec. 1461:

"(a) The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in . . . any permit issuable to any foreign air carrier under section 402 of this Act, shall be presented to the President for review. The President shall have the right to disapprove any such Board action concerning such . . . permits solely upon the basis of foreign relations or national defense considerations which are within the President's jurisdiction. . . ."

Section 802, 49 U.S.C. sec. 1462:

"The Secretary of State shall advise the Secretary of Transportation, the Board, and the Secretary of Commerce, and consult with the Secretary of Transportation, Board, or Secretary of Commerce, as appropriate, concerning the negotiations of any agreement with foreign governments for the establishment or development of air navigation, including air routes and services."



Section 1102, 49 U.S.C. sec 1502:

"(a) In exercising and performing their powers and duties under this chapter, the Board and the Secretary of Transportation shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries. . . .

"(b) In formulating United States international air transportation policy, the Congress intends that the Secretary of State, the Secretary of Transportation, and the Civil Aeronautics Board shall develop a negotiating policy which emphasizes the greatest degree of competition that is compatible with a well-functioning international air transportation system. This includes, among other things:

(1) the strengthening of the competitive position of United States air carriers to at least assure equality with foreign air carriers, including the attainment of opportunities for United States air carriers to maintain and increase their profitability, in foreign air transportation;

(2) freedom of air carriers and foreign air carriers to offer fares and rates which correspond with consumer demand;

(3) the fewest possible restrictions on charter air transportation;

(4) the maximum degree of multiple and permissive international authority for United States air carriers so that they will be able to respond quickly to shifts in market demand;
(5) the elimination of operational and marketing restrictions to the greatest extent possible;
(6) the integration of domestic and international air transportation;
(7) an increase in the number of nonstop United States gateway cities;
(8) opportunities for carriers of foreign countries to increase their access to United States points if exchanged for benefits of similar magnitude for United States carriers or the traveling public with permanent linkage between rights granted and rights given away;
(9) the elimination of discrimination and unfair competitive practices faced by United States airlines in foreign air transportation, including excessive landing and user fees, unreasonable ground handling requirements, undue restrictions on operations, prohibitions against change of gauge, and similar restrictive practices; and
(10) the promotion, encouragement, and development of civil aeronautics and a viable, privately owned United States air transport industry.

"(c) To assist in developing and implementing such an international aviation negotiating policy, the Secretaries of State and Transportation and the Civil Aeronautics Board shall consult, to the maximum extent practicable, with the Secretary of Commerce, the Secretary of Defense, airport operators, scheduled air carriers, charter air carriers, airline labor, consumer interest groups, travel agents and tour organizers, and other groups, institutions, and government agencies affected by international aviation policy concerning both broad policy goals and individual negotiations.

"(d) The President shall grant to at least one representative of each House of Congress the privilege to attend international aviation negotiations as an observer if such privilege is requested in advance in writing."



## STATEMENT OF THE CASE

Appellant is a corporation established and existing under the laws of Canada with its principal offices and base of operation located in Canada. It is engaged in international air transportation services as a common carrier of passengers and property. Its foreign air transport service is primarily charter in character. Its international services originate largely out of Canada to destinations in Europe, the Caribbean, Mexico and the United States.

In order for a foreign air carrier such as Appellant to perform charter services to and from the United States, a license to operate in such foreign air commerce must be granted to it by the Federal Government. Appellant applied pursuant to Section 402 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1372, for such a license,a foreign air carrier permit, from the Federal Government which was

granted.[2] Under the provisions of the permit issued to Appellant by the Federal Government, (S.J.A. at A-73), Appellant's charter foreign air transportation service is limited to that authorized by the U.S./Canada Nonscheduled Air Services Agreement of May 8, 1974, TIAS 7826, 25 UST 787. S.J.A. at A-48, A-66. The term of Appellant's permit also depends on the continuation of that international bilateral agreement or another subsequent international agreement between the United States and Canada covering the same type of air service. S.J.A. at A-78. Pursuant to its foreign air carrier permit authority, Appellant operates round-trip charter[3] programs between Canada and the United States with many of those operations in and out of points in Florida.[4]

[2]CAB Order 80-8-97 (July 18, 1980), and the foreign air carrier permit issued to Appellant pursuant to that Board order are printed in J.S.A. at A-68 -A-81.

By an exchange of diplomatic notes, dated May 24, 1984, the United States and Canada agreed to add new route authority to be operated by one U.S. air carrier, and one Canadian air carrier between Canada and Puerto Rico through an amendment to Schedules I and II of the United States—Canada Air Transport Services Agreement, TIAS 5972, 17 UST 201 (Jan. 17, 1966), as amended by TIAS 7824, 25 UST 784 (May 8, 1974). Appellant has been designated by Canada to operate a scheduled service between Toronto/Montreal, Canada, and San Juan, Puerto Rico, pursuant to the U.S./Canada exchange of diplomatic notes. Appellant has applied for a foreign air carrier permit with the Department of Transportation to perform that additional service. DOT has granted Appellant an exemption, DOT Order 85-3-50 (March 20, 1985), to operate the scheduled service during the processing of Appellant's permit application.

[3]While the U.S./Canada bilateral agreement is identified as the Nonscheduled Air Services Agreement between the United States and Canada, Annex B to that agreement defines nonscheduled air service as charter air service permitted under the terms of the agreement. S.J.A. at A-64.



The Florida legislature on or about March 3, 1983, enacted Florida Senate Bill 8A. S.J.A. at A-42. It was signed into law by the Florida governor effective April 1, 1983. Florida Senate Bill 8A imposes a 5 percent fuel tax, denominated by the Florida Department of Revenue as an excise tax, on all aviation fuel drawn from Florida storage facilities based on a calculated, not an actual price per gallon. S.J.A. at A-44 -A-45 (Fla. Stat. Ann. sec. 212.70(3)).

The challenged Florida legislation declares that the "levy of tax is upon the ultimate retail consumer." S.J.A. at A-44 (Fla. Stat. Ann. Sec. 212.70(2)(a)). The fuel supplier is designated under Florida Senate Bill 8A "as agent for the state in the collection of said tax" from the airline. S.J.A. at A-44 (Fla. Stat. Ann. sec. 212.70(2)(a)). The statute therefore intends that the actual economic burden of the fuel tax be borne by the airlines, with the supplier acting on behalf of Florida as agent to collect the tax.

All aviation fuel purchased by Appellant from Florida storage facilities and fully taxed by Florida under

[4]Appellant's foreign commerce air services to and from the United States and Canada are governed not only by the Federal Aviation Act of 1958, as amended, and extensive regulations of the Department of Transportation issued pursuant to the authority granted to it by that Act, but Appellant's foreign commerce services are also controlled by a number of multilateral aviation agreements which the United States has entered into with numerous foreign countries including Canada. E.g., *Convention on International Civil Aviation*, 61 Stat. 1180, TIAS 1591, 15 UNTS 295 (Dec. 7, 1944); *Convention for the Unification of Certain Rules Relating to International Transportation by Air*, 49 Stat. 3000, TS 876, 137 LNTS 11 (Oct. 12, 1929).

the challenged state legislation is used exclusively in foreign commerce as an energy source to propel Appellant's aircraft used in its foreign charter air transport operations pursuant to the foreign air carrier permit issued to Appellant by the Federal Government.

Prior to the passage of Florida's aviation fuel tax, concern as to the imposition of such a tax by Florida on foreign nationals operating services in foreign air commerce was expressed in a letter to the Florida Department of Revenue, dated September 29, 1982, by the United States Department of State. S.J.A. at A-82. The U.S. State Department in that letter advised the Florida Department of Revenue of the "generally-accepted and long-standing international practice of reciprocally exempting [aviation fuel] from taxes". S.J.A. at A-83. The State Department advised:

> "The United States obligation to accord these exemptions stems from our adherence to Article 24 of the International Convention on Civil Aviation (Chicago, 1944) and to the air transport agreements which the United States has with over 70 foreign countries." S.J.A. at A-82.

The State Department concluded that: "A proliferation of state and local taxes would frustrate the international system of reciprocal tax exemptions." S.J.A. at A-83.

The Florida Department of Revenue responded stating that "Florida recognized the importance of foreign airlines . . . many years ago, and . . . the generous tax advantages allowed them have not changed." S.J.A. at A-85.



After Florida Senate Bill 8A was enacted, the U.S. State Department wrote another letter (S.J.A. at A-87) to the Florida Department of Revenue expressing "concern regarding the recent enactment of a state tax on aviation fuel", and observing that:

> "If imposed, this tax will cause serious foreign relations problems unless provision is made to exclude foreign airlines."

Shortly after Florida Senate Bill 8A became law,Appellant filed its complaint in the Leon County Circuit Court challenging the constitutionality of the law insofar as it authorizes the assessment and collection of fuel taxes from Appellant.[5] That Circuit Court held that the challenged Florida legislation did not violate the United States Constitution, but that it is inconsistent with the U.S./Canada Nonscheduled Air Services Agreement, and on that basis granted Appellant a permanent injunction from the assessment and collection of fuel taxes by Appellee. J.S.A. at A-21 – A-24.

Appellee appealed the final judgment of the Circuit Court to the intermediate appellate court; Appellant filed a cross-appeal and the intermediate appellate court certified the case to the Florida Supreme Court. On June 14, 1984, in a divided opinion the Florida Supreme Court affirmed that part of the Leon County Circuit court decision holding that Florida Senate Bill 8A is

[5]Appellant and Appellee stipulated that, pending a final decision of this case, Appellant is permitted to self accrue the fuel tax imposed by Florida Senate Bill 8A. The funds so accrued are maintained in a segregated escrow account.

constitutional,[6] but reversed the Court's holding "to the extent that it recognized an exemption [from the assessment and collection of fuel taxes] for foreign airlines." S.J.A. at A-6.

The Florida Supreme Court missed the full scope of this Court's decisions which it cites: *Japan Line v. Country of Los Angeles,* 441 U.S. 434 (1979), and *Hines v. Davidowitz,* 412 U.S. 52 (1941). It concluded that the Nonscheduled Air Services Agreement between the United States and Canada, TIAS 7826, 25 UST 787 (1974), intended to exempt the carriers of the signatory nations "from national excise taxes" (S.J.A. at A-6), and therefore the imposition of Florida's facilities by foreign carriers for use solely in foreign commerce was not precluded by Congress (S.J.A. at A-5), nor "prevents our federal government from speaking with one voice."[7] S.J.A. at A-6. If not reversed, that decision will have adverse future repercussions affecting this Nation's ability to deal effectively with foreign nations to achieve international goals affecting this Country's national interests.

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[6]The Florida Supreme Court decision concluded that section 6 of Florida Senate Bill 8A violated the Commerce Clause of the U.S. Constitution by providing a corporate tax credit to Florida-based airlines, but that violation according to the Florida Supreme Court decision is severable from the remaining provisions of the bill without hampering the legislation's primary purpose. This aspect of the Florida Supreme Court decision is not a subject of this appeal.

[7]The Florida Supreme Court also concluded that the possibility of multiple taxation was not in issue. Appellant concurs.



## SUMMARY OF ARGUMENT

Florida has imposed a fuel tax on aviation fuel uplifted from facilities in Florida into the aircraft of a foreign national, Appellant, for use as a propellant of such aircraft engaged exclusively in international air commerce.[8] A set of circumstances analogous to the circumstances of this case was considered by the Court in *Japan Line v. County of Los Angeles,* 441 U.S. 434 (1979). There, California taxed cargo containers used exclusively in international commerce owned by a national of Japan. The Court in *Japan Line* concluded that such a state tax prevents the Federal Government from uniformly regulating foreign commerce relations with foreign governments and therefore violates the commerce clause of the United States Constitution.

The Court reached its decision in *Japan Line* by considering certain international agreements (the Customs Convention on Containers primarily, see, 441 U.S. at 446 (note 10)), to which the United States and Japan were signatories granting national tax exemptions as to cargo containers used exclusively in international commerce and on the basis of the Court's analysis of the international agreements reasoned that the cargo containers of Japan Line are instrumentalities of foreign commerce. In this case there are inter-

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[8]Whether the enactment of this fuel tax by Florida violated the U.S. Constitution turns not on the characterization Florida has given the tax, but on its operation and effect. *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U.S. 69 (1946).

national agreements to which the United States and Canada (Appellant is a national of Canada) are signatories granting tax exemptions for aviation fuel used exclusively in international air commerce (Chicago Convention, Art. 24(a) *supra* at 3; U.S./Canada Nonscheduled Air Services Agreements, S.J.A. at A-48 –A-67); the Chicago Convention grants the same type of tax relief for aviation fuel used by foreign nationals in foreign air commerce as the tax relief granted for Japan Line's cargo containers through the Customs Convention on Containers; the Nonscheduled Air Services Agreement, between the United States and Canada grants a tax exemption for aviation fuel "taken on board" by one nation's carriers "in the territory of the other . . . and intended solely for use in international air services". S.J.A. at A-58. If on the basis of the international agreements considered by the Court in deciding the *Japan Line* issues, the Court concluded that the cargo containers involved there were instrumentalities of foreign commerce, then the aviation fuel involved in this case must be considered as an instrumentality of foreign commerce. Certainly the concept that fuel used in commerce is an instrumentality of that commerce is not new to the Court. To the Court an "instrumentality of commerce" is a "means of commerce." *Helson v. Kentucky,* 279 U.S. 245, 251-252 (1929).

The Court in *Japan Line* concluded that while the Customs Convention on Containers did not specifically exempt the instrumentalities of foreign commerce (i.e., cargo containers) from state taxation, it "reflects a national policy to remove



impediments to the use of" instrumentalities of foreign commerce. 441 U.S. at 453. Since "California's tax . . . will frustrate attainment of federal uniformity", it "is inconsistent with Congress' power to 'regulate Commerce with foreign Nations' ", and it is therefore "unconstitutional under the Commerce Clause." 441 U.S. at 453-454. In view of the tax relief granted to aviation fuel used exclusively by Appellant in foreign commerce through the Chicago Convention and the U.S./Canada Nonscheduled Air Service Agreement it is submitted that the same conclusion should be reached in this case as to the Florida fuel tax on the aviation fuel drawn by Appellant from Florida facilities for use in foreign commerce. There can be no concern that the aviation fuel pumped into Appellant's aircraft in Florida will be used for anything other than for foreign commerce since the license granted to Appellant by the Federal Government to operate to and from the United States restricts Appellant's service to foreign air transportation.

From another perspective the Florida fuel tax violates the Constitution. When the Florida fuel tax is imposed on aviation fuel drawn from Florida storage into Appellant's aircraft for foreign commerce purposes, it violates a clear unequivocal directive of Congress. As pointed out in *Container Corp. of America v. Franchise Tax Board,* 463 U.S. 159, 194 (1983), this consideration is "essentially a species of preemption analysis." The Federal Aviation Act of 1958, as amended, and the declarations of Congress through that Act disposes of this point.

In 1978, the Congress passed the Airline Deregulation Act, 92 stat. 1705 (Oct. 24, 1978), and thereby largely deregulated U.S. domestic airline services. But foreign air transportation was not deregulated. Far from it. The regulation of the international transport system is still, through the amended Act, centrally controlled by the Federal Government. In order for any foreign air carrier to operate in and out of the United States it must apply for and be granted an operating license by the Department of Transportation (section 402 of the Act, 49 U.S.C. sec. 1372) providing in its application all of the information required by the regulations of the Transportation Department (49 CFR Pt. 211). That license usually restricts the service of the foreign air carrier to the service provided for in a bilateral air service agreement between the United States and the foreign carrier's home country. In addition, the foreign air carrier must abide by the statutory requirements and implementing Transportation Department regulations as to service, rates and fares, tariffs, service reporting, competition, and safety in foreign air transportation. An important aspect of the Federal Aviation Act from the point of view of this case, is the delegation by Congress of the power to negotiate and execute agreements with foreign nations as to foreign air transportation matters. Through section 802 of the Act, 49 U.S.C. sec. 1462, Congress delegated to the Department of State, the primary power to negotiate and execute such international agreements with foreign nations as are necessary to achieve the goals set forth in the policy statement of



section 1102 (b) of the Federal Aviation Act of 1958.

Through the provisions of the Federal Aviation Act of 1958, as amended, applicable to foreign air transportation, Congress has issued its directive: the regulation of foreign air commerce relations with foreign nations is the exclusive province of the Federal Government. Congress has declared that foreign air transportation is of such national importance that it requires the uniform exclusive regulation by the Federal Government. In foreign commerce and foreign relations affecting foreign commerce the powers of the Federal Government are exclusive and plenary; they cannot be interfered with in any way through any form of state action. *Japan Line v. County of Los Angeles,* 441 U.S. 434, 448 (1979); *United States v. Pink,* 315 U.S. 203, 233 (1942); *Hines v. Davidowitz,* 312 U.S. 52, 63 (1941); *Board of Trustees of University of Illinois v. United States,* 289 U.S. 48, 56 (1933).

Florida through the imposition of its fuel tax on the aviation fuel uplifted in Florida by Appellant and other foreign national carriers meddled in foreign relations involving foreign commerce. The reaction from foreign nations was immediate and adverse. Retaliation has been threatened. The Florida tax undermined the international air transport authority of the Federal Government. And other states have passed or are considering the passage of similar fuel tax legislation. In the field of foreign air commerce, Florida has no power to act as it did and such

action violated the commerce and supremacy clauses of the United States Constitution.

A reversal of the decision of the Florida Supreme Court will bolster the powers of the Department of State to negotiate and execute reciprocal foreign commerce arrangements with foreign nations. Such a decision will underscore the State Department's power to deal effectively with foreign nations. When disputes arise with other nations on foreign air commerce agreement matters, the State Department will be able to deal more effectively in devising a remedy since this Court will have affirmed that the State Department, through the power delegated to it by Congress, has the sole power to devise a suitable remedy.

## ARGUMENT

### I. THIS CASE CONCERNS THE IMPOSITION OF FLORIDA'S FUEL TAX ON APPELLANT'S AVIATION FUEL UPLIFTS THEREBY VIOLATING THE *JAPAN LINE* "ONE VOICE" STANDARD NOT ONLY BY IMPLICATING FOREIGN POLICY, BUT BY VIOLATING A CLEAR FEDERAL DIRECTIVE.

There is a clash of powers, State against Federal involved in this case; the rules which govern the outcome were adopted over two hundred years ago. Those rules, contained in the U.S. Constitution, require that:

"[W]henever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall,



or how closely allied to powers conceded to belong to the State." *Henderson v. Wickham,* 92 U.S. 259, 272 (1876).

That very circumstance was presented to this Court for decision in *Japan Line v. County of Los Angeles,* 441 U.S. 434 (1979). The question presented was whether a state tax will "impair federal uniformity in an area where federal uniformity is essential." *Japan Line, supra* at 448. In *Container Corp. of America v. Franchise Tax Board,* 463 U.S. 159, 194 (1983), this Court commenting on the *Japan Line* "one voice" standard noted that a state tax violates that standard

> "if it either implicates foreign policy issues which must be left to the Federal Government or violates a clear federal directive. The second of these considerations is, of course, essentially a species of preemption analysis."

In *Japan Line,* the case was decided against the State since the state tax implicated foreign policy. This case, similar as it is in most respects to *Japan Line,* is different in a very important particular: the violation by the State of Florida not only "implicates" national foreign policy, but violates a clear, unequivocal "federal directive."

Just as in the *Japan Line* case, the Appellant is a foreign national engaged exclusively in international commerce, foreign air transportation. And just as in *Japan Line,* a state, Florida, is imposing a tax on an instrumentality of foreign commerce, namely, the jet fuel Appellant uplifts into its aircraft out of Florida storage facilities to be used exclusively for the purpose of propelling such aircraft in foreign air transportation services. The Court came to the conclusion in *Japan Line,* 441 U.S. at 453, that the state by

taxing the cargo containers of Japan Line, construed to be instrumentalities of foreign commerce in that case, impaired uniformity of Federal regulation as to a matter of National concern, foreign commerce, requiring uniform Federal regulation. The Court based that conclusion on international agreements to which the U.S. and Japan were parties which provided for certain tax exemptions for cargo containers used in foreign commerce, and while the agreements did not specifically bar the taxing by states of instrumentalities of commerce, they did reflect "a national policy to remove impediments to the use of" such instrumentalities of foreign commerce. *Japan Line,* 441 U.S. at 453.

In this case, the circumstances are similar to those in *Japan Line*: a state has been taxing an instrumentality of foreign commerce, aviation fuel, of a foreign national, Appellant, a Canadian. The aviation fuel is the subject of international agreements to which the U.S. and Canada are parties granting certain tax exemptions for aviation fuel used in foreign commerce. But there is a significant difference between the two cases. For in this case, in addition to the international agreements, there is a statute–the Federal Aviation Act of 1958, as amended–enacted by Congress focusing on the Federal regulation of all aspects of foreign commerce by air transport, and which delegates principally to the Department of State the power to negotiate and enter into such international agreements with foreign nations as are necessary in order to achieve the international air transport goals set out in that Act.



## II. THE FLORIDA TAX ON APPELLANT'S FUEL USED IN FOREIGN AIR COMMERCE VIOLATES THE *JAPAN LINE* "ONE VOICE" STANDARD SINCE IT INTERFERES WITH "A NATIONAL POLICY" EVIDENCED BY RELEVANT INTERNATIONAL AGREEMENTS "TO REMOVE IMPEDIMENTS TO THE USE OF" INSTRUMENTALITIES OF FOREIGN COMMERCE.

### A. The Aviation Fuel Pumped Into Appellant's Aircraft For Use In International Air Commerce Exclusively Is As Much An "Instrumentality Of Foreign Commerce" Requiring Uniform Federal Regulations As Was the Cargo Containers In *Japan Line*.

#### 1. Fuel used as a propellant in commerce is an instrumentality of commerce, and the Court has said so.

There is nothing in the text of the *Japan Line* decision to indicate that the Court in using the term "instrumentalities" of foreign commerce meant it to have a meaning different from its ordinary meaning of "means", i.e., the "means" of foreign commerce. In *Helson v. Commonwealth of Kentucky,* 279 U.S. 245, 252 (1929),the Court considered fuel used as a propellant in an interstate ferryboat service as an "instrumentality of commerce" showing that by the use of that term is meant the "means of commerce":

> "A tax laid upon the use of the ferryboat would present an exact parallel. And is not the fuel consumed by propelling the boat an instrumentality of commerce no less than the boat itself? . . . [I]t is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected."

In this case the "instrumentality of foreign commerce" being taxed by Florida is aviation fuel pumped into the aircraft of Appellant, a foreign national, solely for the purpose of propelling Appellant's aircraft in international air commerce. There can be no transportation by air in foreign commerce without aviation fuel. Without it, aircraft are immobilized. The aviation fuel is the actual "means" of transport by aircraft. It is submitted that reasonableness dictates that the word "instrumentality" when used in *Japan Line* was used in its ordinary sense. That term should not be used differently here.

**2. Just as in *Japan Line*, the Federal Government has entered into international agreements granting tax exemptions as to instrumentalities of foreign commerce, aviation fuel, requiring uniform Federal Regulations.**

**a. The Federal Government has agreed to grant customs duties and tax exemptions for fuel used in foreign commerce through an international Convention just as cargo containers were so exempted in *Japan Line*.**

In this case the United States has entered into international agreements with foreign nations providing for tax exemptions for aviation fuel purchases when that fuel is used in foreign commerce comparable to the tax exemptions through international agreements granted to Japan Line's cargo containers involved in *Japan Line v. County of Los Angeles*, 441 U.S. 434 (1979), while in use in foreign commerce. The primary international agreement considered by the Court in *Japan Line* was the Customs Convention on Containers, TIAS 6634, 20 UST 301 (May 18, 1956), in determining that the agreement evidenced a national policy for the uniform Federal regulation



of foreign commerce. Article 24 (a) of the Convention on International Civil Aviation (The Chicago Convention), 61 Stat. 1180, TIAS 1591, ratified by the U.S. on August 9, 1946, grants a tax exemption as to aviation fuel used in foreign commerce similar to the tax exemption as to cargo containers used in foreign commerce granted through the Customs Convention on Containers, i.e., an exemption from customs duties and taxes while the instrumentality is being used by a foreign national in foreign commerce.[9] Compare, page 3, *supra*, with 441 U.S. at 446 (note 10). Canada, the United States and over 150 other nations are signatories to the Chicago Convention. The United States notes in its brief *amicus curiae* in support of Appellant's Jurisdictional Statement (pp. 11-12) that the parties to the Chicago Convention are by operation of the Convention's terms members of the International Civil Aviation Organization (ICAO), and that a committee of ICAO, the Air Transport Committee, after a study of taxation in the international air transport field adopted a resolution on November 14, 1966, that aviation fuel taken on board aircraft for consumption in international flight "shall be exempt" from various taxes, duties and charges including sales and excise taxes "by any taxing authority within a State".[10] Since the Chicago Convention grants a tax exemption to aviation fuel used in

[9]The Federal Government also provides to foreign airlines through statutory provisions excise tax exemptions for fuel used in international air commerce on a reciprocal basis. 26 U.S.C. sec. 4221(a)(3), (d)(3), (e)(1).

[10]The *amicus* brief of the United States cites ICAO's *Policies on Taxation in the Field of International air Transport*, ICAO Doc. 8632-C/968 (Nov. 1966).

international commerce virtually identical to the tax exemption granted cargo containers when used in such commerce by the Customs Convention on Containers considered by the Court in *Japan Line*, the logical conclusion is that *Japan Line* dictates a ruling that aviation fuel used in foreign commerce by a foreign national is an instrumentality of foreign commerce requiring uniform Federal regulation.

**b. In addition, in this case, the United States has entered into a bilateral agreement granting tax relief as to aviation fuel to be used in international commerce even when uplifted by a carrier of one nation within the territory of the other; Appellant's fuel uplifts in Florida fits this provision.**

Article XII of the U.S./Canada Nonscheduled Air Services Agreement, TIAS 7826, 25 UST 787 (May 8, 1974), negotiated and executed on behalf of the United States by the U.S. State Department pursuant to section 802 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1462, provides that the airlines of the U.S. and Canada are exempted "to the fullest extent possible" from excise taxes, inspection fees, duties and charges on fuel

> "taken on board aircraft of the carriers of one Contracting Party in the territory of the other Contracting Party and intended solely for use in international air services . . . whether or not such items are consumed wholly within the territory of the Contracting Party granting the exemption." S.J.A. at A-58.

The United States has entered into bilateral air transport service agreements with many foreign nations granting similar tax relief as to aviation fuel used by the foreign nations signing those agreements with the United States. S.J.A. at A-82.



**c. Any aviation fuel uplifts by Appellant in the United States must be for foreign commerce purposes because its operating license issued to it by the Federal Government authorizes it to perform its air transport services exclusively in foreign air commerce.**

Appellant in this case is providing a common carrier air service pursuant to a license issued to it by the Federal Government (section 402 of the Federal Aviation Act of 1958, 49 U.S.C. sec. 1372) which limits its operations to that foreign commerce service agreed to in the U.S./Canada Nonscheduled Air Service Agreement. S.J.A. at A-68 - A-78. Therefore, there can be no concern that the fuel uplifted in Florida by Appellant will be used for any purposes other than foreign commerce.

**B. The Tax By Florida of Appellant's Aviation Fuel Used in Foreign Commerce Is An Interference And Actually Prevents Uniform Federal Regulation Of Foreign Commerce, And Therefore It Is In Violation Of The Foreign Commerce Clause Of The U.S. Constitution.**

If the international agreements considered in *Japan Line* evidenced a "national policy to remove impediments to the use of containers" in foreign commerce, which they did, then the U.S./Canada Nonscheduled Air Services Agreement and the Chicago Convention "reflects" a similar national policy as to aviation fuel with at least the same strength and force as in *Japan Line* because the purposes of the international agreements in the *Japan Line* case,

and those in this case are indistinguishable. 441 U.S. at 453.

Since the international agreements being considered in this case demonstrate a national policy requiring uniform Federal regulation of foreign air commerce with foreign nations, there must be a consideration of whether the Florida fuel tax prevents or interferes with that uniform Federal regulation. If the Florida fuel tax violates this principle it is unconstitutional and therefore invalid. *Japan Line v. County of Los Angeles,* 441 U.S. 434 (1979). How the State of Florida and the Florida Supreme Court interprets the state tax statute in question does not affect a decision in this case, for when there is a question of whether a state tax violates the U.S. Constitution the issue turns on its operation and effect rather than the characterization given to it by the state. *Richard Oil Corp. v. State Board of Equalization,* 329 U.S. 69 (1946). The Florida tax on Appellant's aviation fuel uplifted in Florida must fail because it interferes with the uniform Federal regulation of international commerce just as did the California tax on cargo containers interfered with the uniform Federal regulation of foreign commerce in *Japan Line.*[11]

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[11]The Florida Second Circuit judgment, granting Appellant a permanent injunction against the Florida Department of Revenue from assessing and collecting fuel taxes from Appellant found "Senate Bill 8A inconsistent with the undertakings of United States government in international bilateral agreements designed to establish federal uniformity and prevent retaliatory taxes on U.S. carriers." S.J.A. at A-22.



**1. The Federal Government through the State Department enters into international agreements in an attempt to achieve the goals set down by Congress in Section 1102(b) of the Federal Aviation Act, but those efforts will be diluted, diffused and contradicted if the Florida Supreme Court decision is upheld.**

International air transport agreements between the United States and other nations exist on a complex world-wide basis. Pursuant to the power delegated to the Department of State through section 802 of the Federal Aviation Act, 49 U.S.C. sec. 1462, to negotiate and execute such international air transport agreements with foreign nations as are necessary to achieve the goals set forth by Congress in section 1102(b) of the Federal Aviation Act, 49 U.S.C. sec. 1502(b), bilateral and multilateral international air transport agreements have been entered into over the years by the Federal Government with other nations.[12]

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[12]President Truman in a message to the Senate submitting the Chicago Convention took note of the fact that international commercial bilateral air transport agreements had been entered into without ratification "under authority vested in me." International Civil Aviation Conference, Message from the President, 79th Cong., 2d sess. 92 Cong. Rec. 6661-6662 (June 11, 1946). The Attorney General, in supporting the President's position on executing bilateral agreements without ratification cited the Constitution plus sections 801, 802 and 1102 of the Civil Aeronautics Act of 1938, as amended, putting the air bilateral agreements in the category of "agreements made pursuant to existing legislation." 40 Op.Att'y Gen. 451 (1948). It is to be noted that one of the agreements involved was the bilateral air transport agreement between this country and the United Kingdom which has been a keystone for our transatlantic scheduled service operations. See, M. Whiteman, 14 *Digest of International Law* 219-221 (1970).

The policy of the Federal Government through its bilateral air transport agreements is exemplified by the Nonscheduled Air Services Agreement between the United States and Canada. S.J.A. at A-48. Through that agreement the Federal Government seeks to preserve, protect and promote the continued development of a system of air transportation between the U.S. and Canada able to accommodate the transportation needs of their people with a minimum of artificial restraints, free from discriminatory practices, based on the equitable exchange of economic benefits, and exemptions from taxes on the instruments of foreign air commerce, aviation fuel being one such instrument of foreign commerce. S.J.A. at A-48 -A-49, A-58, A-59.

That international air transport agreement and the policy it adopts is not novel. It is entirely consistent with the international air transportation policy contained in section 1102(b) of the Federal Aviation Act, 49 U.S.C. sec. 1502(b). There are may international bilateral agreements with objectives similar to those of the U.S./Canada Nonscheduled Air Services Agreement including provisions providing for an exemption from taxes on aviation fuel.[13] The United States has

[13]E.g., Art. 7(d) *Aviation Transport Services Agreement,* United States/Colombia, TIAS 5338, 14 UST 432 (Oct. 24, 1956); Art. 7(d) *Air Transport Services Agreement,* United States/Mexico, TIAS 4675, 12 UST 60 (Aug. 15, 1960); Art. 4(c) *Air Transport Services Agreement,* United States/Venezuela, TIAS 2813, 4 UST 1495 (April 13, 1953); Art. 3(b) *Commercial Air Transport Agreement,* United States/Ecuador, TIAS 1606 (Jan 8, 1947), as amended TIAS 2196, 2 UST 482 (Jan. 3, 10, 1951); Art. 3(2) *Air Transport Services Agreement,* United States/United Kingdom, TIAS 1507 (Feb. 11, 1946); Art. 3(b) *Air Transport Services Agreement,* United States/Chile, TIAS 1905 (May 10, 1947); Sec. F(2,3) *Air Transport Services Agreement,* United States/Argentina, TIAS 8978, 29 UST 2795 (Sept. 22, 1947).



bilateral air transport agreements with over 70 foreign countries. See, S.J.A. at A-82.

The success of the Federal Government in achieving the purposes of Congress' international air transport policy may be seriously jeopardized, compromised to the point of failure if the decision of the Florida Supreme Court is affirmed, since its negotiations would be forced to consider the local interests of each individual state that expresses an interest in international affairs affecting foreign air transportation as well as the interest of the involved foreign nation. Such a situation would be intolerable and totally unnecessary. The "one voice" principle must prevent such a scenerio from happening in foreign air transportation.

**2. The Federal Government has been aggressive and persistent in its efforts to eliminate fuel tax discrimination as to U.S. carriers by other nations, but a fuel tax by Florida or other states will jeopardize such efforts.**

The Federal Government pursuant to its continuing policy has been aggressive in its efforts to eliminate the imposition of fuel taxes on U.S. air carriers imposed by other nations.[14] Quite naturally, the imposition of such a tax by an individual state of this

[14]Civil Aeronautics Board ("CAB"), Fiscal Year ("FY") 1982/1981 Report to Congress at 94–96; CAB, FY 1980 Report to Congress at 84; CAB, FY 1979 Report to Congress at 103; CAB, FY 1978 Report to Congress at 96; CAB, FY 1977 and Transition Quarter Report to Congress at 106–109, 114–115; CAB, FY 1976 Report to Congress at 103–104.

Nation on the aviation fuel uplifts of foreign airlines jeopardizes those efforts. That is a key problem with the Florida fuel tax. In its letters to Florida's Department of Revenue (S.J.A. at A-82, A-87), the U.S. State Department warned Florida that the imposition of its fuel tax on foreign airlines would "frustrate" the purposes of the international air transport agreements entered into by the Federal Government with foreign nations and the reciprocal arrangements that have been established by the Federal Government, and that a Florida fuel tax would trigger retaliation through the imposition of similar taxes by foreign governments on the airlines of the United States generally. S.J.A. at A-82 – A-83.

Just as predicted by the State Department, when Florida imposed its enacted fuel tax on the aviation fuel pumped into the aircraft of foreign nationals from Florida storage the response by foreign governments to the enactment of the Florida fuel tax was immediate and adverse. The brief *amicus curiae* of the United States supporting Appellant's Jurisdictional Statement shows (p. 21, and the attached Appendix) that there were protests from about 25 foreign countries. The tax was perceived by them as a tax on aviation fuel and an agreement breach by the Federal Government which may affect this Nation's foreign air transport system through possible retaliatory measures by the foreign governments. *Supra* at 22.

**3. The fuel tax imposed by a state of the United States is viewed by foreign nations as a national tax.**

The acts of the individual state governments of the United States affecting foreign commerce are perceived by foreign nations as if they are the acts of the Federal Government, as if those acts were acts of the National Government even when those state acts are without Federal support and are opposed to Federal foreign policy. *Japan Line v. County of Los Angeles,* 441 U.S. 434, 450-451, 453 (1979); *United States v. Pink,* 315 U.S. 203, 232-233 (1942); *United States v. Belmont,* 301 U.S. 324, 331 (1937); *Board of Trustees of University of Illinois v. United States,* 289 U.S. 48, 57 (1933). From the standpoint of foreign nations, a tax on fuel used in foreign commerce by foreign nationals is a national tax, no matter its origins or whether sanctioned by the Federal Government since in foreign relations matters their dealings with the United States are with the Federal Government and to them, the individual states do not exist. *United States v. Belmont, supra* at 330-331. If a state action involving foreign relations and commerce runs counter to the terms agreed to by the Federal Government through its international agreements such state action is considered by the foreign government involved as a breach of the international obligations assumed by the Federal Government. The continued effectiveness of the Federal Government in international affairs without exclusive powers in that field would be jeopardized critically. On that basis, the Court in *Japan Line,* 441 U.S. at 450-451, concluded that a state tax on an instrumentality of foreign commerce used by a foreign national exclusively in international commerce violated the commerce clause of the U.S. Constitution:

> "If a novel state tax creates an asymmetry in the international tax structure, foreign nations disadvantaged by the levy may retaliate against

American-owned instrumentalities present in their jurisdictions. Such retaliation of necessity would be directed at American transportation equipment in general, not just that of the taxing State, so that the Nation as a whole would suffer. If other States followed the taxing State's example, various instrumentalities of commerce could be subjected to varying degrees of multiple taxation, a result that would plainly prevent this Nation from 'speaking with one voice' in regulating foreign commerce." Footnote omitted.

**4. If other states impose a tax similar to Florida's–which has happened–the intrusion on the uniform Federal regulation of foreign commerce will be aggravated further; this prospect was important in the *Japan Line* decision that a state's taxing of a instrumentality of foreign commerce used in that commerce by a foreign national is unconstitutional.**

With other states of the United States adopting a similar tax on aviation fuel used in foreign air commerce by foreign airlines[15] the intrusion by the individual states in foreign air commerce and the inevitable retaliatory responses by foreign nations to such taxation will further erode the ability of the Federal Government to achieve viable working relationships with other nations so necessary to foster a sound and effective international air transport system. The power of the Federal Government to achieve the goals in foreign air transportation set out in section 1102(b) of the Federal Aviation Act, 49 U.S.C. sec. 1502(b), would be seriously weakened. The ability of the Federal Government to fulfill its obligations under international air transport agreements and such reciprocal arrangements as it may agree to with other nations would be substantially impaired. The inevitability of this sequence of events was the basis for this Court to hold that a tax by a state on a foreign national's instrumentalities of foreign commerce is unconstitutional. *Japan Line v. County of Los Angeles*, 441 U.S. 434, 450-454 (1979). The same conclusion is applicable to the state fuel tax involved in this case: the Florida fuel tax as it is applied to Appellant's uplift of aviation fuel for foreign commerce purposes violates the Commerce Clause of the United States Constitution.

[15]The brief *amicus curiae* of the United States (pp. 33-34) in support of Appellant's Jurisdictional Statement shows that at least three other states—Illinois, Massachusetts, and California—have enacted or are contemplating the enactment of fuel tax legislation to tax the aviation fuel of foreign air carriers.



**5. The conclusion reached in *Japan Line* that the taxing by a state of an instrumentality of commerce used exclusively in foreign commerce by a foreign national violates the Constitution's Commerce Clause is the conclusion required by the circumstances of this case.**

In *Japan Line*, 441 U.S. 434 (1979), the question before the Court concerned the imposition of a state tax on cargo containers used exclusively in international commerce by their foreign national owner. In reaching its decision in *Japan Line,* the Court considered certain international agreements (*Japan Line,* 441 U.S. at 446 (note 10)) to which the United States is a party exempting such containers from import duties and tax while they are in use in foreign commerce. It was on the basis of the tax exemptions granted in the international agreements considered by the Court in *Japan Line* that it concluded that the cargo containers of Japan Line while used in foreign

commerce are instruments of foreign commerce. The Court then concluded that the international agreements "evidenced" the "desirability of uniform treatment of containers used exclusively in foreign commerce" (441 U.S. at 452), and "California's tax . . . will frustrate attainment of federal uniformity." 441 U.S. at 453. The Court concluded that "[f]oreign commerce is pre-iminently a matter of national concern" which the Constitution commits to the exclusive authority of the Federal Government to regulate (441 U.S. at 448), and therefore the taxing of "instrumentalities of foreign commerce" (441 U.S. at 445-446), the cargo containers of Japan Line, by a state is "unconstitutional under the Commerce Clause." 441 U.S. at 454. With the circumstances of this case so comparable to the circumstances in *Japan Line,* the same conclusion must be reached as to the Florida fuel tax: the Florida tax when imposed on Appellant's aviation fuel uplifts in Florida into Appellant's aircraft for solely foreign commerce purposes is "unconstitutional under the Commerce Clause." 441 U.S. at 454.

## III. CONGRESS HAS ISSUED A CLEAR DIRECTIVE THROUGH THE FEDERAL AVIATION ACT THAT THE FEDERAL GOVERNMENT HAS THE EXCLUSIVE REGULATORY POWER OVER FOREIGN AIR COMMERCE.



### A. A Foreign Air Carrier Such As Appellant Cannot Operate In Foreign Air Commerce To And From The United States Without A License To Do So Issued To It By The Federal Government Pursuant To The Federal Aviation Act.

Appellant, based in Canada, operates its common carrier air service, to and from the United States pursuant to operating authority granted to it by, and subject to the strict regulations of the Federal Government (the Department of Transportation, and the Department of State, principally).[16] Its Canada-U.S. charter air services are licensed by the Federal Government through a foreign air carrier permit (S.A.J. at A-73) granted to Appellant by the Civil Aeronautics Board pursuant to section 402 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec.1372.[17] CAB Order 80-8-97 (S.J.A. at A-68), is-

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[16]Effective January 1, 1985 (section 1601(b)(2) of the Federal Aviation Act of 1958, as amended, 49 U.S. C. sec. 1551(b)(2)) "The authority of the Civil Aeronautics the Board under this Act with respect to foreign air transportation is transferred to the Department of Transportation which shall exercise such authority in consultation with the Department of State." Section 1601(b)(1)(B) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1551(b)(1)(B).

[17]Only a "foreign air carrier" may obtain an operating permit to engage in foreign air transportation pursuant to section 402 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1372. A "foreign air carrier" is defined by section 101 (22) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1301(22), to mean "any person, not a citizen of the United States, who undertakes . . . to engage in foreign air transportation." Foreign air transportation is defined by section 101(24) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1301 (24), to mean "the carriage by aircraft of persons or property as a common carrier for compensation or hire in com-

suing a foreign air carrier permit to Appellant, shows that said order and permit were presented to the President of the United States pursuant to section 801(a) of the Federal Aviation act of 1958, as amended, 49 U.S.C. sec. 1461(a), to determine whether the permit would be disapproved by him on the basis of "foreign relations or national defense considerations", and the President on August 18, 1980, notified the CAB that the President did not intend to issue a disapproval. S.J.A. at A-71 (note 2). The permit limits explicitly Appellant's Canada-U.S. service to that authorized by the Nonscheduled Air Services Agreement between the United States and Canada, TIAS 7826, 25 UST 787, (May 8, 1974). S.J.A. at A-48.

**B. The Power to Regulate All Aspects Of Foreign Air Commerce—Licensing, Service, Competition, Rates, Tariffs, Safety And The Negotiation And Execution Of Air Transport Agreement With Foreign Nations—In Accordance With The Goals Set Forth In The Federal Aviation Act Has Been Reserved To The Federal Government By Congress.**

The broad breadth of the Federal regulatory control over foreign air transportation is of great significance here. The circumstances involved in *Japan Line* v. *County of Los Angeles,* 441 U.S. 434 (1979), did not include the pervasive Federal regulatory dominance which exists in this case as to foreign commerce by air transport. Foreign air commerce between this Nation and others is no *laissez-faire* field of service.

merce between . . . a place in the United States and any place outside thereof. . . ." U. S. nationals generally obtain authority to operate in foreign air transportation through section 401 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1371.



International air transportation is a highly structured segment of foreign commerce strictly controlled by the Federal Government. That tight Federal control has survived and under current legislation will continue to survive the almost complete deregulation of the domestic field of air transport through the passage of the Airline Deregulation Act of 1978, 92 Stat. 1705 (Oct. 24, 1978). The course and composition of foreign air commerce is shaped by the Federal Government through its powers over licensing, route services and other air services,[18] rates and fares,[19] tariffs,[20] competition,[21] safety,[22] and most important

[18]As to foreign air carriers such as Appellant, section 402 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. 1372 is the chief licensing provision. 14 CFR Pt. 211 sets out the evidence requirements to be contained in permit applications. Examples of regulations controlling services performed in foreign commerce by foreign carriers operating pursuant to section 402 licenses are: 14 CFR Pts. 212, 214 and 380 (charter services), 213 (scheduled service), 216 (commingling of blind sector traffic), 217 (service reporting), 218 (aircraft leasing with crew), 222 (intermodal cargo service), 375(foreign civil aircraft navigation within U.S.).

[19]Section 404(b), 49 U.S.C. sec. 1374(b), and sec. 1002(f), 49 U.S.C. sec. 1482(f).

[20]Section 403, 49 U.S.C. sec. 1373, and 14 CFR Pt. 221.

[21]The Federal Aviation Act of 1958 was amended to achieve a better competitive environment in the international air transport field through the International Air Transportation Competition Act of 1979, 94 Stat. 35 (Feb. 15, 1980), H.R. Reps. No. 96-716 (Conf. Rep.) 96th Cong., 1st Sess. 1-2 (1979). See, sec. 411, 49 U.S.C. sec. 1381; sec. 1102(b), 49 U.S.C. sec. 1502(b); and 49 CFR Pt. 91 (Int'l Air Transportation Fair Competition).

[22]Section 601, 49 U.S.C. sec. 1421. The power granted by this section of the Act is over safety regulation in "air commerce." Section 101(4) of the Act, 49 U.S.C. sec. 1301(4) defines "air commerce" to include "foreign air commerce."

here, the extensive power delegated to the Department of State by Congress through section 802,[illegible] 49 U.S.C. sec. 1462, and section 1102(a),(b),(c),(d), to negotiate air transport agreements with foreign nations in order to move toward the realization of the Federal foreign air transport goals set forth in section 1102(b) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1502(b). Section 1102(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1502(a), requires the Department of Transportation in administering the Federal Aviation Act to regulate foreign air transportation in accordance with obligations assumed by the United States through such agreements.

In essence the goals set forth in section 1102(b) of the Federal Aviation Act seek a fully competitive foreign air transportation system free to the maximum extent possible from government interferences. The ability of the Federal Government to negotiate air transport agreements of various types with other nations without hindrance by any of the individual states of the Nation is an imperative. The United States Congress has demonstrated in direct terms through

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[illegible]Section 802 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1462, is virtually identical to section 802 of its predecessor aeronautics act, the Civil Aeronautics Act of 1938. The Conference Report as to section 802 of the latter act states that "This section authorizes negotiations by the State Department of agreements with foreign governments for the establishment of air routes and services between the United States and foreign countries . . . . Section 802 of the conference agreement merely requires the State Department to advise the Authority of all negotiations relating to such matters and consult with the Authority with respect to them." H. R. Rep. No. 2635 (Conf. Rep.), 75th Cong. 3d sess. 76 (1938).



the Federal Aviation Act that foreign air transportation is of such national interest that it requires the uniform exclusive regulation by the Federal Government. As the Court concluded in *Henderson v. Wickham*, 92 U.S. 259, 273 (1876):

> "A regulation [the Federal Aviation Act of 1958, as amended, in this case] which imposes . . . conditions on those engaged in active commerce with foreign nations must of necessity be national in its character."

And "in matters where the national importance is imminent and direct even where Congress has been silent the States may not act at all." *Sanitary District of Chicago v. United States*, 266 U.S. 405, 426 (1925).

In this case there has been no Congressional silence. Congress has expressed itself forcefully. Congress has declared through the Federal Aviation Act of 1958, as amended, that the field of foreign air transportation is of the uppermost national importance requiring regulation by the Federal Government exclusively. It has provided for the licensing of foreign as well as U.S. air carriers, provided for the regulation of that industry's air services, competition and safety requirements. It has also enacted an international air transportation policy and delegated to the Department of State the power to negotiate and execute those agreements with foreign governments as are necessary to achieve the policy goals Congress enacted. Congress left no room for local government participation. The enactment of the Federal Aviation Act is a clear directive by that branch of the Federal Government which has the plenary power to regulate foreign commerce:

> "The power to regulate commerce with foreign nations is expressly conferred upon Congress, and, being an enumerated power, is complete in itself, acknowledging no limitations other than those prescribed in the Constitution." *Butterfield* v. *Stranahan*, 192 U.S. 470, 492–493 (1904).

The power of Congress over foreign commerce is "exclusive and absolute." *Butterfield, supra* at 492–493. In the field of foreign air commerce, Florida has no power to act as it did.

**C. When Congress Issues A Directive, As It Did Here, Reserving All Power To Regulate Foreign Air Commerce To The Federal Government, Such Powers Cannot Be Interfered With In Any Way Through Any Form Of State Action; Florida's Fuel Tax On Appellant's Aviation Fuel Used In Foreign Commerce Is Just Such An Interference And It Therefore Violates The Commerce And Supremacy Clauses of the Constitution.**

When Florida passed its legislation taxing aviation fuel used by Appellant and other foreign nationals solely for foreign air commerce purposes, it exceeded its powers and entered a field reserved exclusively to the Federal Government. It intruded itself into the realm of Federal foreign policy involving as it does foreign air commerce relationships with other nations, an area in which Congress holds the power exclusively, where policy considerations and the power to



achieve foreign air transportation goals have been vested by the Congress of the United States in the Federal Government. Congress issued a directive through the enactment of the Federal Aviation Act of 1958, and its many amendments. Congress declared that foreign air transportation is of such national importance that it is to be regulated by the Federal Government. It enacted an international air transportation policy, and delegated to the Department of State the power to negotiate such agreements with foreign nations as are necessary to achieve the goals set forth in the policy statement of Congress.

Under such circumstances as enumerated above, the interference by Florida through its fuel tax legislation involving international air commerce affairs is not tolerated by the Constitution. The court has stressed repeatedly that:

> "In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." *Board of Trustees of University of Illinois* v. *United States,* 289 U.S. 48, 59 (1933).

In *United Stated* v. *Pink,* 315 U.S. 203, 232–233 (1942), the Court held that:

> "If state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a State created difficulties with a foreign power. . . .
>
> ". . .No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is

> vested in the national government exclusively. . . ."

And in *United States* v. *Belmont,* 301 U.S. 324, 330-331 (1937), the Court stated this principal of exclusivity in these clear terms:

> "Government power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government. . . .
>
> * * *
>
> ". . . In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the state of New York does not exist. . . ."

Congress, through the provisions contained in the Federal Aviation Act of 1958, as amended, has left no area of foreign air commerce in which any state of the United States may exert any unilateral powers. In foreign air commerce and foreign relations affecting foreign air commerce the powers of the Federal Government are exclusive and plenary, and therefore they cannot be interfered with in any way through any form of state action. *Japan Line* v. *County of Los Angeles,* 441 U.S. 434, 448 (1979); *United States* v. *Pink,* 315 U.S. 203, 233 (1942); *Hines* v. *Davidowitz,* 312 U.S. 52, 63 (1941); *Board of Trustees of University of Illinois* v. *United States,* 289 U.S. 48, 56 (1933). Florida, like the other individual states, has no powers in this field:

> "The Federal Government, representing as it does the collective interests of the . . . states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. 'For local interests the several states of the Union exists, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.' Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." Footnote omitted. *Hines* v. *Davidowitz,* 312 U.S. 52, 63 (1941).



Florida's enactment of Florida Senate Bill 8A insofar as it taxes the aviation fuel pumped from Florida facilities for use by foreign nationals in foreign air commerce exceeds the powers granted to it under the Constitution of the United States, and therefore, such legislation violates the United States Constitution, notonly the Commerce Clause, but the Supremacy Clause as well.

**D. A Decision Holding That Florida Violated The U.S. Constitution By Imposing A Fuel Tax On Appellant's Aviation Fuel Used In Foreign Commerce Will Affirm The Exclusive Power Of The Federal Government To Negotiate And Execute International Air Transport Agreements And To Devise Solutions When There Are Foreign Relations Problems, Without A Concern That Any State Or Local Government Might Interfere.**

A decision by this Court that the enactment by Florida of a fuel tax on fuel uplifted in Florida by Appellant and other foreign nationals for exclusively international air commerce purposes violates a directive of Congress will not impair the power of the Department of State to negotiate and execute reciprocal arrangements with foreign nations needed to

achieve section 1102(b) goals. For if the Department of State has that power today—and it does—it does not lose that power by such a decision. Such a decision affirms that power and protects it from future challenge. It prohibits the states from taxing instruments of foreign commerce operated by foreign nationals except to the extent authorized by the Federal Government. It also gives to the Department of State the power to deal more effectively with foreign nations when disputes arise since the Federal Government through the Department of State has the sole power to devise the remedy it believes will suit the problem.

Here, there is a clear Congressional directive through the provisions of the Federal Aviation Act that in the field of foreign air commerce it is the Federal Government that calls the tune. It is the Federal Government that is the conductor of the music, deciding how it is to be played and who are the players. It should be able to do so with total control of the harmony, free from any discordant drummers with a different tune in mind. A reversal of the decision of the Florida Supreme Court will accomplish this task.

## CONCLUSION

For the foregoing reasons, it is earnestly requested that the decision of the Florida Supreme Court be reversed.



Respectfully submitted,

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(9)

CASE NO. 84-902

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1985

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WARDAIR CANADA INC.,

Appellant,

v.

STATE OF FLORIDA
DEPARTMENT OF REVENUE,

Appellee.

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ON APPEAL FROM THE
SUPREME COURT OF FLORIDA

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# BRIEF FOR APPELLEE

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34pp

# QUESTION PRESENTED

Whether the excise tax imposed by Florida upon the privilege of engaging in the business of selling tangible personal property which includes aviation fuel unconstitutionally impairs the power of the federal government to regulate foreign commerce.

# TABLE OF CONTENTS

TABLE OF CITATIONS

Florida Statutes



Other

STATEMENT OF THE CASE

Appellee has previously set forth the Statement of the Case in its Motion to Dismiss or Affirm on pages 2 through 11 heretofore filed in the instant case.

## REFERENCES

The parties are those named in the caption. Reference to the Appellant's brief will be as follows "84-902 A.B.". However, the Solicitor General on behalf of the United States filed an Amicus Curiae Brief in support of Appellant's Jurisdictional Statement (referred to as "84-902 U.S. Br.") and a brief in support of Appellant (referred to as "84-902 U.S.").



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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No. 84-902

WARDAIR CANADA INC., APPELLANT

v.

STATE OF FLORIDA
DEPARTMENT OF REVENUE
APPELLEE

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ON APPEAL FROM THE SUPREME COURT OF FLORIDA

---

BRIEF FOR APPELLEE

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## SUMMARY OF ARGUMENT

The tax at issue herein is plainly a sales tax because its legal incidence is upon the seller of the fuel and is imposed on the privilege of selling fuel in Florida. Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950); Delta Air Lines, Inc. v. Department of Revenue, 455 So.2d 317, 321

(Fla. 1984); appeal dismissed, No. 84-929 (Oct. 15, 1985); (See 84-921 A.C. 7).

The Appellant contends that Florida's tax prevents the United States from speaking in "one voice" by "implicating nationally important foreign policy issues", violating a clear "directive" of Congress and with this Court's decision in Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979).

In Japan Line, this Court set forth two additional requirements to the "four-prong" test of Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). The first was whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation. The second was whether the tax prevents the federal government from "speaking with one voice when regulating commercial relations with foreign governments." The decision of the Florida Supreme Court is consistent with Japan Line and meets both of the additional tests.



It should be pointed out that Appellant's statement that fuel should be likened to the containers involved in Japan Line is incorrect. The containers in Japan Line were, in fact, the instrumentalities used for shipping property into the United States. The containers would be likened to the aircraft themselves and not to the fuel which is consumed by the aircraft in flying into the United States. Thus, Appellant's assertion that the fuel is an instrumentality of commerce is unfounded.

Florida's tax does not cause asymmetry in the international tax structure which operates automatically to foreign nations' disadvantage. Today, as in the past, Florida provides equal and symmetrical treatment of foreign and domestic airlines in the taxation of sales of fuel purchased in Florida.

Appellant errs when saying that the Florida tax "operates automatically to

foreign nations' disadvantage." The tax is clearly neutral in its treatment of foreign airlines. It is therefore consistent with the federal policy of nondiscriminatory treatment of foreign airlines.

Florida's tax is not contrary to an expressed federal policy nor does it impermissibly implicate foreign affairs. The tax does not interfere with the authority of the United States to regulate commercial relations with foreign governments, nor does it violate a clear "directive" of Congress.

Appellant argues that through a clear "directive" from Congress, set forth in 49 U.S.C. §1462 and §1502(b), the power of Florida to impose the excise tax in question has been preempted.

There is nothing in either 49 U.S.C. §1462 or §1502(b) which specifically preempts the field of state excise taxation. Indeed, the <u>contrary</u> is expressed in 49 U.S.C. §1513(b).



It is therefore apparent that, contrary to the Appellant's position, Congress has <u>not</u> preempted the field of state excise taxation. Indeed, Congress specifically reserved this area of the <u>state's primary source</u> of <u>revenue</u> to the state.

As there is no federal preemption applicable here, this Court must analyze the agreement to determine its content and coverage.

In the international compacts (See 84-902, U.S. Br. 10-16), the federal policy expressed is a spirit of equality of opportunity and treatment.

Clearly, in this area, the federal government has spoken with one voice to accomplish equality of treatment.

By the official international compacts, the federal policy expresses a pattern which falls far short of any prohibition upon state taxation of aviation fuel purchased by foreign airlines.

As there is no specific exemption provided in any of the international agreements from state excise taxes, the Florida sales tax imposed under Chapter 212, F.S., as amended, is lawful, permissable and constitutional.

The "one voice" of the Federal Government has spoken, saying that all airlines should be treated equally in every respect and that there should be no discrimination in favor of domestic airlines against foreign airlines. The Florida tax does not violate this federal policy.

## ARGUMENT

This case concerns the validity of certain provisions of Chapter 212, Florida Statutes (hereinafter cited as "F.S."), as amended by Chapter 83-3, Laws of Florida, under the Commerce and the Supremacy Clauses of the United States Constitution,



Article I, Section 8, Clause 3, and Article VI, Clause 2, respectively, and the Nonscheduled Air Service Agreement between the United States and Canada of May 8, 1974, TIAS 7826, 25 UST 787.

Chapter 212, F.S., amended by Chapter 83-3, Laws of Florida, is commonly referred to as the "sales tax law of Florida." Chapter 212, F.S., has been construed by the Florida Supreme Court and other Florida appellate courts on numerous occasions as an excise tax levied on the privilege of engaging in certain businesses and transactions as provided in said statute. Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950); Delta Airlines, Inc. v. Department of Revenue, 455 So.2d 317, 321 (Fla. 1984); appeal dismissed, No. 84-929 (Oct. 15th, 1985).

The tax at issue herein is plainly a sales tax because its legal incidence is upon the seller of the fuel and is imposed

for the privilege of selling fuel in Florida. (See 84-921 A.C. 7). Additionally, as this Court recognized in dismissing the appeals by the domestic airlines (See 84-921, 84-926 and 84-929), the tax imposed by Chapter 83-3 meets the four-prong test of Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), reh. den., 430 U.S. 976, and does not violate the Commerce Clause.

The Appellant contends that the decision of the Florida Supreme Court, reported at 455 So.2d 326 (Fla. 1984), JSA at A1-A7, which upholds Florida's excise tax, is inconsistent with federal policy as it relates to the taxation of aviation fuel purchased by foreign airlines in the United States, and with this Court's decision in Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979). Based on those premises, Appellant argues that Florida's tax should be declared unconstitutional as applied.



In Japan Line, this Court set forth two additional requirements to the "four-prong" test of Complete Auto. The first was whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation. The second was whether the tax prevents the federal government from "speaking with one voice when regulating commercial relations with foreign governments." The decision of the Florida Supreme Court is consistent with Japan Line and meets both of the additional tests.

As conceded by Appellant (See 84-902 A.B. 12, n. 7), the "multiple taxation" aspect of Japan Line is not an issue in the instant case. Appellant neither proved nor argued that Florida's sales tax involved in this case "produces multiple taxation in fact" (Japan Line, 441 U.S. at 452). Additionally, Florida's sales tax does not "create a substantial risk of international

multiple taxation" (Id. at 451) (See 84-902 U.S. Br. 30-31). The decision of the Florida Supreme Court is consistent with these observations.

Nevertheless, Appellant suggests that Florida's excise tax prevents the United States from speaking with "one voice" by "implicating nationally important foreign policy issues," violating a clear "directive" of Congress, and failing to meet the second test in Japan Line, and thus is unconstitutional as applied.

I

First, it should be pointed out that Appellant's statement that fuel should be likened to the containers involved in Japan Line is incorrect. The containers in Japan Line were, in fact, the instrumentalities used for shipping property into the United States. The containers would be likened to the aircraft themselves and not to the fuel



which is consumed by the aircraft in flying into the United States. Thus, Appellant's assertion that the fuel is an instrumentality of commerce is unfounded. Furthermore, Appellant inaccurately states that Florida imposes a tax on aviation fuel. This is not true. Florida's tax is an excise tax imposed upon the privilege of engaging in the business of selling tangible personal property including fuel. (See 84-921 U.S. Br. 7). The excise tax is imposed on the vendor or dealer and is a privilege tax not a property tax as suggested by Appellant. The tax addressed by this Court in Japan Line was a property tax. Florida's excise tax is on the privilege of engaging in business and therefore is totally dissimilar from the ad valorem property tax imposed on the property itself (the containers), in Japan Line.

II

Contrary to Appellant's contention, Florida's tax does not cause asymmetry in the international tax structure which operates automatically to foreign nations' disadvantage. Appellant leaves the impression that, prior to 1983, Florida granted foreign airlines a proration of the tax which was not granted to domestic airlines in international commerce. In fact, at that time both foreign and domestic airlines, operating over international routes, and traveling only briefly in Florida's airspace, were granted the proration on a mileage basis. With the abolition of the proration of the tax, foreign and domestic airlines continue to to be treated equally by Florida. Today, as in the past, Florida provides equal and symmetrical treatment of foreign and domestic airlines in the taxation of sales of fuel purchased in Florida.



Appellant errs when saying that the Florida tax "operates automatically to foreign nations' disadvantage." This is a pure sales tax imposed upon the privilege of engaging in the business of selling tangible personal property which includes aviation fuel, irrespective of its use, whether in domestic or foreign commerce. The incident upon which the tax is imposed occurs prior to any commitment of the aviation fuel to any commerce, foreign or domestic. The tax is clearly neutral in its treatment of foreign airlines. It is therefore consistent with the federal policy of nondiscriminatory treatment of foreign airlines.

III

Florida's tax is not contrary to an expressed federal policy nor does it impermissibly implicate foreign affairs.

In analyzing this excise tax's impact on foreign affairs, an examination must be made of the "one voice" doctrine. Florida contends that its tax does not interfere with the authority of the United States to regulate commercial relations with foreign governments, nor does it violate a clear "directive" of Congress.

The issue raised by the Appellant that Florida's tax violates a clear "directive" of Congress must be disposed of before analyzing the "one voice" of the federal government as expressed in the agreement between the United States and Canada.

Appellant argues that through a clear "directive" from Congress, set forth in 49 U.S.C. §1462 and §1502(b), the power of Florida to impose the excise tax in question has been preempted.

Appellant asserts that the Federal Aviation Act and specifically 49 U.S.C.



§1462 and §1502(b) is a clear "directive" of Congress prohibiting the excise tax involved here. The Federal Aviation Act has among its purposes the promotion and regulation of competition in the air transportation industry, promotion of air safety and prevention of aviation accidents. See 49 U.S.C. §1302 and §1303.

Congress has directed "[t]he Secretary of State [to] advise the Secretary of Transportation . . . concerning the negotiation of any agreement with foreign governments for the establishment or development of air navigation, including air routes and services" (49 U.S.C. App. §1462). "In formulating the United States international air transportation policy," Congress has provided that the Secretary of State, in consultation with the Secretary of Transportation, "shall develop a

negotiating policy which emphasizes the greatest degree of competition that is compatible with a well-functioning international air transportation system" (49 U.S.C. App. §1502(b)). (See 84-902 U.S. 1,2) (e.s.)

It is under the authority of 49 U.S.C. §1462 and §1502(b) that the International Bilateral Agreement of the U.S./Canada Nonscheduled Air Services Agreement (TIAS 7826) was entered into, however, the areas to be covered by the agreement are those areas set forth in 49 U.S.C. §1502(b).[1]

There is nothing in either 49 U.S.C. §1462 or §1502(b) which specifically preempts the field of state excise taxation. Indeed, the contrary is

[1]There are many international bilateral agreements with objects similar to those of the U.S./Canada Nonscheduled Air Service Agreements. These agreements cover the countries from which the other foreign airline amici operate. (See 84-902 U.S. Br. 10-17.)



expressed in 49 U.S.C. §1513. In §1513(a), Congress has provided a prohibition on certain state taxes as they apply to air transportation. Section 1513(a) is not applicable here. Further, as this Court stated in Aloha Airlines v. Director of Taxation of Hawaii, 464 U.S. 7, 104 S.Ct. 291, 294, n. 6 (1983), in §1513(b) Congress has reserved:

> . . . [t]he States' primary sources of revenue, such as property taxes, net income taxes, franchise taxes, and sales or use taxes. (citation omitted). We find no paradox between §1513(a) and §1513(b). [Section] 1513(a) preempts a limited number of state taxes, including gross receipts taxes imposed on the sale of air transportation or the carriage of persons traveling in air commerce. §1513(b) clarifies Congress's view that the States are still free to impose on airlines and air carriers "taxes other than those enumerated in subsection (a)", such as property taxes, net income taxes, and franchise taxes. While neither the statute nor its legislative history explains exactly why Congress chose to distinguish between gross receipts taxes imposed on airlines and the taxes reserved in §1513(b), the statute is quite

clear that Congress chose to make the distinction, and the courts are obliged to honor this congressional choice." (e.s.).

It is therefore apparent that, contrary to the Appellant's position, Congress has not preempted the field of state excise taxation. Indeed Congress specifically reserved this area of the state's primary source of revenue to the state.

As there is no federal preemption applicable here, this Court must analyze the agreement to determine its content and coverage. In other words what is the "one voice" which is speaking in the U.S./Canada Nonscheduled Air Service Agreement and the other international bilateral agreements upon which the various amici are claiming an exemption from the Florida sales tax.

In the international compacts (See 84-902, U.S. Br. 10-16), the federal policy expressed is a spirit of equality of



opportunity and treatment. The ICAO's Resolution (See 84-902 U.S. Br. 11), passed under the Chicago Convention on International Civil Aviation, implements the Convention's purpose: to avoid discrimination against airlines among contracting nations. The Convention (See 84-902 U.S. Br. 10), exempts only aviation fuel and supplies which are "on board an aircraft."

Clearly, in this area, the federal government has spoken with one voice to accomplish equality of treatment. While the international compacts "differ in subtle ways" (84-902 U.S. Br. 34), it can be stated without equivocation that the agreements do not explicitly interdict or preempt state taxes, such as the Florida tax involved in the instant case. (84-902 U.S. Br. 17).

By the official international compacts, the federal policy expresses a pattern which falls far short of any prohibition upon state taxation of aviation fuel purchased by foreign airlines. Thus it appears the only _final_ federal pronouncement on the "exemption" Appellant urges is an exemption from national duties and national excise taxes. Accordingly, by application of the well recognized rule of _expressio unius est exclusio alterius_ no exemption from state excise tax can be held to exist by virtue of these agreements.

As Appellant has stated, the policy of the Federal Government through its bilateral air transport agreements is exemplified by the Nonscheduled Air Service Agreement between the United States and Canada. (84-902 A.B. 28)

The agreement between the United States and Canada, upon which Appellant relies, provides in part:



> 2. Neither Contracting Party shall give a preference to its own carriers over the carriers of the other Contracting Party in the application of its customs, immigration, quarantine, and similar regulations or in the use of airports, airways, and other facilities under its control.
>
> . . .
>
> Neither Contracting Party shall discriminate against a carrier or among carriers of the other Contracting Party providing the services covered by this Agreement.

_Nonscheduled Air Service Agreement_, U.S. - Canada, Articles XIII and XIV, TIAS 7826. (J.S.A. at A-59).

Article XII of said agreement provides:

> Each Contracting Party shall exempt the carriers of the other Contracting Party to the fullest extent possible under its national law from import restrictions, customs duties, excise taxes, inspection fees, and _other national duties and charges_ on fuels, lubricants, consumable technical supplies . . .
>
> _Nonscheduled Air Service Agreement_, U.S. - Canada, Article II, Paragraph 1, TIAS 7826. (J.S.A. at A-58). (e.s.)

The Executive Branch of the Federal Government has spoken only to national taxes. Article XII of the Agreement only speaks to national duties and charges on fuel. The agreement is silent on the subject of state excise taxes, no doubt recognizing the state's sovereign power to tax. Therefore, the agreement does not preempt the state's taxing power. It is apparent from the amici briefs filed by the other foreign airlines that all these agreements fall far short of declaring a national policy of preemption because the agreements speak only to the United States Government using its best efforts to secure an exemption from state taxation.

The language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them. Guarantee Trust Co. v. United States, 304 U.S. 126 (1938).



The Florida Supreme Court recognized that the provision in the agreement dealing with duties and excise taxes applied only to national customs duties, excise taxes and charges, and further recognized that the purpose of the agreement was to preserve and promote the continued development of a system of air transport free from discriminatory practices and to support equal commercial opportunity between the nations. Relying on this Court's decision in Pennsylvania v Nelson, 350 U.S. 497 (1956), the Florida Supreme Court applied the three-prong test to determine the supremacy of a federal regulatory scheme over the state regulation in the same or similar area. Thus, the Florida Supreme Court's decision is consistent with (1) the language of the various agreements themselves, and (2) this Court's application of the three-prong test in Nelson.

The Appellant is apparently requesting this Court to ignore the international compact and the expressed federal policy contained therein. Further, they seek to have this Court amend or rewrite these agreements to include an exemption from state excise taxes. Florida contends that Appellant and Amici are bound by these agreements which should not be subject to judicial renegotiation.

As there is no specific exemption provided in any of the international agreements from state excise taxes, the Florida sales tax imposed under Chapter 212, F.S., as amended, is lawful, permissable and constitutional.

One method of ascertaining the meaning given to the agreement is to see how the agreement is being implemented by the contracting parties. As the Solicitor General stated in his brief at page 4, "while the United States airlines, through



bilateral executive agreements, are exempt from taxes imposed by the Canadian National authorities on fuel purchased in Canada, Canada's provincial governments also 'impose taxes on aviation fuel and, like Florida, [they] generally do not grant an exemption for fuel purchased by foreign airlines for use in foreign commerce'. (U.S. Br. 13) . . . Ten Canadian provincial governments currently impose taxes on the sale of aviation fuel. In their structure and incidence, these taxes are similar to the challenged Florida tax." (See 84-902 U.S. 4-5).

It is of note that the Appellant did not address the manner in which its home country has interpreted the very agreement which is before this Court. This interpretation by Canada is just another indication that Appellant's "policy argument" for a tax exemption from state excise taxes is not contained within the

"one voice" of the federal government as expressed in the bilateral agreement. When such "policy arguments" are directed to this Court however, they "are directed to the wrong forum" (Japan Line, 441 U.S. at 456, 457).

The "one voice" of the Federal Government has spoken, saying that all airlines should be treated equally in every respect and that there should be no discrimination in favor of domestic airlines against foreign airlines. The Florida tax does not violate this federal policy. The outcome of this case should indeed be dictated by this federal policy as enunciated in the particular compacts. The Compacts in their "idiosyncratic provisions" have set forth a federal policy which places no restrictions on a state's power to impose a nondiscriminatory excise tax, such as Florida's, upon the privilege of engaging in the business of selling



tangible personal property, such as aviation fuel. The Florida tax is certainly consistent with equality of treatment and it is consistent with federal policy as expressed in the international compacts.

CONCLUSION

Accordingly, the decision of the Florida Supreme Court should be affirmed.

Respectfully submitted,

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No. 84-902



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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WARDAIR CANADA INC.,

*Appellant,*

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

*Appellee.*

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**On Appeal From The Supreme Court of Florida**

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# REPLY BRIEF FOR APPELLANT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Table of Authorities Continued**



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*Appellee.*

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**On Appeal From The Supreme Court of Florida**

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## REPLY BRIEF FOR APPELLANT

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### STATEMENT

This brief is in reply to the briefs on the merits of Appellee (Florida), and the Amici Curiae Brief in support of Florida on behalf of the National Governors' Association, the International City Management Association, the National Conference of State Legislatures, the National League of Cities, the Council of State Governments, the U.S. Conference of Mayors, and the National Association of Counties (Local Taxing Amici).[1] The motion of Local

[1] On February 24, 1986, the Court granted Local Taxing Amici's motion to file a brief as Amici Curiae.

Taxing Amici for leave to file a brief forcefully demonstrates what will be the effect of a holding affirming the Florida Supreme Court decision. A proliferation of taxing legislation by states, counties, and/or cities throughout the United States can be expected, taxing, as has Florida, the jet fuel used exclusively in international air transportation by foreign nationals. The result will be to debilitate seriously the effectiveness of the Federal Government to achieve the statutory foreign air transportation policies, enacted by Congress and contained in section 1102(b) of the Federal Aviation Act of 1958, 49 U.S.C. sec. 1502(a), through appropriate international regulatory agreements with relevant foreign nations negotiated and executed by the Department of State pursuant to section 802 of the Act, 49 U.S.C. sec. 1462, on behalf of the United States. The State Department in a letter to Florida's Department of Revenue anticipated the effect of Florida's tax on the aviation fuel of foreign airlines: "A proliferation of state and local taxes would frustrate the international system of reciprocal tax exemptions." S.J.A. at A-83. The Court foresaw the same problem in *Japan Line,* 441 U.S. at 453:

> "If other States follow California's example . . . [the] result, obviously, would make 'speaking with one voice' impossible."

The Court forbade such an erosion of the Federal Government's power in foreign commerce by declaring such action unconstitutional. *Japan Line* v. *County of Los Angeles,* 441 U.S. 434 (1979).



## ARGUMENT

**I. Florida and Local Taxing Amici Would Have This Court Apply Interstate Commerce Standards To An Exclusively Foreign Commerce Issue Involving International Regulation By The United States And Its Foreign Nation Partners; A Field Which This Court Has Held Repeatedly Is In The Sole Domain Of The Federal Government.**

What Florida and Local Taxing Amici refuse to recognize is the broad inherent, "exclusive and absolute" Federal power to negotiate international agreements with foreign nations regulating foreign commerce without interference by the individual states and other local governments. *Buttfield* v. *Stranahan,* 192 U.S. 470, 492–493 (1904). In the field of international air transportation, Congress devised a highly structured regulatory system through the Federal Aviation Act of 1958, as amended, and has set out in that Act the international goals to be achieved by the Federal Government. 49 U.S.C. sec. 1502(b). Through it Congress delegated to the State Department the powers essential to negotiate and execute international agreements with foreign nations in order to achieve its statutory goals. 49 U.S.C. sec. 1462. Any foreign air transportation service rights for U.S. and foreign carriers can be achieved only through such international agreements spelling out the terms and conditions of service, or by consensus reached between the governments based on reciprocity and comity. In any regulatory negotiations with foreign nations, diplomacy and tact are mandatory if Congress' international air transport competition goals for U.S. carriers (49 U.S.C. sec. 1502(b)) are to be realized since many foreign nations own all or have

part interests in the airlines those nations will designate for service[2] once the regulatory agreement is achieved.[3]

Florida and Local Taxing Amici also ignore the continual and perpetual international negotiating process which the Federal Government is required to carry out in order to improve and upgrade air service opportunities for U.S. carriers in the foreign air transportation field. See, U.S. Br.I at 20; U.S. Br.II at 9-10. If foreign governments perceive an inability of the United States to fulfill its international commitments, then the statutory international goals of Congress may be seriously impaired or thwarted. Retaliation may result affecting the Nation as a whole if the U.S. breaches its obligations, but such retaliation may not be in kind. As the United States noted (U.S. Br.II at 10):

> "In the past, United States carriers have encountered a variety of discriminatory measures abroad, including the levy of artificially-inflated 'user fees,' the imposition of obstacles to repatriation of foreign earnings, the routing of airlines to less desirable airports, the refusal to let carriers use baggage handlers of choice, the award to local airlines of preference in carrying air cargo, the imposition of restrictions on United States airlines' local advertising, and the infliction of excessively complicated customs procedures and bureaucratic red tape. See U.S. Civil Aeronautics Board, *FY 1976 Report to Congress* 103-108 (1977)."

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[2] Canada has no equity interest in Appellant, its parent company,or any of its subsidiary or affiliate corporations.

[3] U.S. Br.I at 2-3. The United States has filed two briefs in support of Appellant. Its first brief supported Appellant's Jurisdictional Statement and is referred to throughout this brief as U.S. Br.I. Its subsequent brief on the merits supporting Appellant's position that the Florida Supreme Court decision should be reversed is referred to as U.S. Br.II.



One of Congress' principal international aviation goals is the elimination of just such discriminations by foreign nations. Section 1102(b)(9) of the Act, 49 U.S.C. sec. 1502(b)(9).

U.S. carrier participation in foreign air transportation is totally dependent on the ability of the Federal Government to operate effectively in foreign affairs unencumbered by the provincial interests of this Nation's political subdivisions. If the positions of Florida and Local Taxing Amici are upheld, the well being of this Nation's international air transportation system will be put in serious jeopardy. *Japan Line* v. *County of Los Angeles*, 441 U.S. 434, 448 (1979). In spite of the adverse risks to this Nation's foreign air transport system if they prevail, Florida and Local Taxing Amici would have this court adopt strictly interstate commerce standards to resolve the strictly foreign commerce issue in this case. The precedents cited by them for their positions are cases resolving domestic rather than international issues. For example: *Hillsborough County* v. *Automated Medical Labortories*, 105 S.Ct. 2371 (1985), and *Silkwood* v. *Kerr-McGee Corp*, 464 U.S. 238 (1984). In the *Hillsborough* case the question was whether federal regulations setting minimum standards as to the collection of blood plasma preempted a local ordinance which prevented individuals with hepatitis from donating their blood. This Court upheld the local ordinance. In so doing the Court observed that "the regulation of health and safety matters [within local borders] is primarily, and historically, a matter of local concern. See *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S., at 230, 67 S.Ct., at 1152." *Hillsborough*, 105 S.Ct. at 2378. Similarly, the *Silkwood* case did *not* involve the foreign commerce clause. The issue in that case was a local one, involving damages authorized under Oklahoma law as to the conduct of the Appellee involving radiation hazards.

The point that Florida and Local Taxing Amici have overlooked, whether intentionally or not, is the differences

in the considerations when the issue involves interstate commerce rather than foreign commerce. Those differences were noted by the Court in *Japan Line* v. *County of Los Angeles,* 441 U.S. 434, 449 (note 13) (1979): "Congress' power to regulate *interstate* commerce may be restricted by considerations of federalism and state sovereignty. It has never been suggested that Congress' power to regulate *foreign* commerce could be so limited." Emphasis added. As to relations with foreign governments affecting foreign commerce the powers of the Federal Government are and must be exclusive and plenary. Those Federal powers cannot be interfered with in any way through any form of state action.[4] See Appellant's Br. at 40-43. This point was stressed by the Court in *Japan Line,* 441 U.S. at 448:

> "Foreign commerce is pre-eminently a matter of national concern. 'In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.' *Board of Trustees* v. *United States,* 289 U.S. 48, 59 (1933)."

In *Board of Trustees* v. *United States,* 289 U.S. at 56-57 (1933), the Court stressed that the Federal Government's power over foreign commerce "may *not* be limited, qualified, or impeded to any extent by state action." Emphasis

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[4] Florida erroneously advocates that the standards of *Pennsylvania* v. *Nelson,* 350 U.S. 497 (1956), be applied in this case noting (Florida's Br. at 25) that those standards are "to determine the supremacy of a federal regulatory scheme over the state regulation in the same or similar area." But that case pertained to a question of shared powers (i.e., federalism) between the state and Federal Government requiring an inquiry as to whether the Federal Government had preempted the field. Such an inquiry is *not* applicable here since this case deals exclusively with the U.S. foreign commerce relationships with foreign nations, an area in which the individual states and their political subdivisions have *no* power. *United States* v. *Belmont,* 301 U.S. 324, 330 (1937).



added. In *Buttfield* v. *Stranahan,* 192 U.S. 470, 492 (1904), the Court held that Congress has the "plenary power" to regulate foreign commerce. And in *Hines* v. *Davidowitz,* 312 U.S. 52, 63 (1941), the Court emphasized that the national interest "imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."[5]

*Container Corp. of America* v. *Franchise Tax Board,* 463 U.S. 159 (1983), does *not* advance the position taken by Local Taxing Amici, although frequently cited by it.[6] Basically, *Container* is *not* a foreign commerce clause case. A domestic issue was the principal focus of that case having "merely . . . foreign resonances." 463 U.S. at 194. As a result, since *Container* involved an issue *domestic* in nature, the U.S. system of federalism required a balancing of federal and state powers. *See e.g., Japan line,* 441 U.S. at 448 (note 13); *Hines* v. *Davidowitz,* 312 U.S. at 63; *United States* v. *Belmont,* 301 U.S. 324, 330 (1937). It was that balancing process which the Court used in *Container* to reach its majority decision. The subject tax in *Container* was "on a domestic corporation," "not on a foreign entity as was the case in *Japan Line,*" (463 U.S. at 195), or as is the case here.[7]

In *Container* the appellant did *not* challenge the state's right to tax appellant's income; it was the state's formula for such taxation which the *Container* appellant challenged.

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[5] See, Alexander Hamilton in Federalist Paper No. 80: "The peace of the whole ought not to be left at the disposal of a part. The Union will undoubtedly be answerable to foreign powers for the conduct of its members."

[6] Wisely, Florida does not suggest that *Container Corp. of America* in any way supports its position.

[7] The Court in *Container* noted that its opinion did not address "the constitutionality . . . with respect to state taxation of domestic corporations with foreign parents or foreign subsidiaries." 463 U.S. at 189 (note 26).

463 U.S. at 184. In this case the tax itself is challenged. The tax in *Container* was on the income of a domestic entity. In *Japan Line,* just as in this case, the tax was on the instrumentality of foreign commerce used exclusively in such commerce and owned by a foreign national. 463 U.S. at 185. While in *Container,* the Court ruled that it would be unfair to preclude the state from taxing appellant's income, it also noted the *Japan Line prohibition* of a state taxing an instrumentality of foreign commerce used in such commerce by a foreign national does "no more than reflect consistent international practice and express federal policy." 463 U.S. at 190. Finally, while a majority of the court construed the *Container* issue to be primarily domestic, three Justices demonstrated in a dissenting opinion that they would follow *Japan Line,* and would declare the state's tax unconstitutional.

**II. Florida And Local Taxing Amici Would Have The Court Retreat From The *Japan Line* Decision, Urging That In The Foreign Commerce Realm, The Substitution Of The Interstate Commerce Standards of *Complete Auto* For Foreign Commerce Standards Of *Japan Line;* Local Taxing Amici Terming the "One Voice" Doctrine As A "Notion," The Instrumentality Of Foreign Commerce Question To Be Of "No Significance."**

Florida and Local Taxing Amici view the *Japan Line* decision from substantially different perspectives. Florida candidly perceives the *Japan Line* "one voice" doctrine to be of substantial significance. But Florida concludes that its fuel tax does not violate that doctrine since the "Federal Government has spoken, saying that all airlines should be treated equally in every respect." Florida's Br. at 28. Florida goes on to say (p. 28) that its fuel tax does treat domestic and foreign airlines equally. It taxes them both. This view of the meaning of the *Japan Line* "one voice" standard misses the mark by a substantial margin. In *Japan Line,* California engaged in no discrimination. Both



domestic and foreign transport carriers were taxed by it. The Court, however, rightly concluded that the tax of California on instrumentalities of commerce that are owned and exclusively used in international commerce by foreign nationals violates the foreign commerce clause of the U.S. Constitution. The *Japan Line* decision requires the same result in this case. See Appellant's Br. at 21-34.

Local Taxing Amici takes a radically different approach. It attempts to obscure the total dependence of the U.S. foreign air transport system upon the ability of the Federal Government to achieve commercial relationships with foreign governments. It disregards how necessary it is for those foreign governments to be confident that the U.S. can and will live up to its commitments. Local Taxing Amici labels the *Japan Line* "one voice" standard as a "notion" (Local Taxing Amici Br. at 21), the instrumentality of foreign commerce question in *Japan Line* of "no significance" (Local Taxing Amici Br. at 19 (Note 12)), and finally that the Florida fuel tax does *not* "conflict in any way" (Local Taxing Amici Br. at 14) with the Chicago Convention and the other international agreements relating to the taxing of aviation fuel used in international air transportation to which United States is a party. Local Taxing Amici Br. at 14-16. In essence, the position of Local Taxing Amici is that as to foreign commerce issues where regulations by the United States in partnership with foreign governments are required, that the interstate commerce standards of *Complete Auto Transit* v. *Brady,* 430 U.S. 274 (1977), should apply, *not* the foreign commerce standards of *Japan Line.* Local Taxing Amici Br. at 24.

Rather than being just a "notion," the "one voice" standard of *Japan Line* was the crux of that decision. On the basis of the application of the "one voice" standard, the Court in *Japan Line* held that when a state tax violated the "one voice" standard "it is unconstitutional under the Commerce Clause." *Japan Line,* 441 U.S. at 451. It is the "one voice" standard of *Japan Line* which ensures

that the Federal Government's power in foreign commerce remains uninfringed.

The "one voice" standard was applied in *Japan Line* to the issue: "whether instrumentalities of commerce that are owned, based, and registered abroad and that are used exclusively in international commerce, may be subjected to . . . taxation by a State." 441 U.S. at 444. In so doing the Court declared that "When a State seeks to tax the instrumentalities of foreign commerce, two additional considerations, *beyond those articulated in Complete Auto,* come in to play. The first is the enhanced risk of multiple taxation." Emphasis added. *Japan Line,* 441 U.S. at 446. The second is that "a state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential." *Japan Line,* 441 U.S. at 448. This second consideration is the "one voice" standard. 441 U.S. at 451. If either the first or the second concept is contravened by a state tax, the Court held, that tax is unconstitutional. 441 U.S. at 451. The Court in *Japan Line* concluded that California's tax on an instrumentality of foreign commerce owned by a foreign national and used exclusively in international commerce violated the "one voice" standard and was therefore unconstitutional. 441 U.S. at 454.

Instead of being of "no significance," the determination of whether the state tax was on an "instrument of foreign commerce" was basic to the "one voice" determination of *Japan Line.* The Court notes in *Container Corporation of America* v. *Franchise Tax Board,* 463 U.S. 159, 188 (1983), the importance of the "instrument of foreign commerce" factor in *Japan Line* and because of the absence of that factor in *Container, Japan Line* was not followed:

> "The . . . difference between this case and *Japan Line* is that the tax here falls, not on the foreign owners of an instrumentality of foreign commerce, but on a corporation domiciled and headquartered in the United States."



That distinction between the circumstances in *Container* and *Japan Line* set forth in *Container* is as applicable to the circumstances of this case. Here, the circumstances are virtually identical to those in *Japan Line. Container* is just *not* an applicable precedent in this case.

Local Taxing Amici attempts to minimize (p. 14) the importance of the Chicago Convention stating that the Florida fuel tax does *not* "conflict" with that convention. However, the Chicago Convention in this case is as decisionally important to the issue here as the Customs Convention on Containers was in *Japan Line.*

In reaching its decision that the California tax violated the *Japan Line* "one voice" standard the Court in *Japan Line* determined that the cargo containers used by foreign nationals exclusively in international transportation are instrumentalities of commerce "as a matter of law" based on the provisions of the Customs Convention on Containers, 20 U.S.T. 301, 304 (1956), a multilateral agreement signed by the United States and other nations, providing that containers while used in international commerce and temporarily imported into the United States are admitted free from import and customs duties. The Container Convention did *not* address state and local taxes. A virtually identical situation exists as to the international air transportation field. The United States has entered into a multilateral convention, the Chicago Convention, 61 Stat. 1180, TIAS 1591 (eff. 1947), in which the United States along with 155 other countries including Canada have agreed through Article 24(a) (See Appellant's Br. at 3) that aviation fuel on board an aircraft engaged in international air transportation "shall be exempt from customs duty, inspection fees or similar national or local duties and charges." Appellant submits that on the basis of *Japan Line* and the analysis in that decision through which the

Court determined that the cargo containers were instrumentalities of foreign commerce, a similar analysis in this case based on Article 24(a) of the Chicago Convention mandates a conclusion that as a matter of law aviation fuel used to propel aircraft in foreign air transportation is an instrumentality of foreign commerce.[8]

The Court not only resolved the instrumentality of foreign commerce question in *Japan Line* through its analysis of the purposes of the Container Convention, but it also determined through that analysis the need for uniform regulatory treatment of the instrumentalities of foreign commerce, and that national policy exists to bar hindrances to the use of them. 441 U.S. at 453. The purposes of the Container Convention and the Chicago Convention cannot be differentiated. The Court's conclusions in *Japan* after its analysis of the Container Convention is as applicable to the treatment in the Chicago Convention of aviation fuel used in international services:

> "The desirability of uniform treatment of containers [aviation fuel in this case] used exclusively in foreign commerce is evidenced by the . . . Convention . . . .The Convention reflects a national policy to remove impediments to the use of containers [aviation fuel in this case] as 'instruments of international traffic.' " 441 U.S. at 452-453.

[8] Local Taxing Amici does not contest Appellant's conclusion that the jet fuel it uplifts at Florida for exclusively international air transportation is an instrumentality of foreign commerce. Local Taxing Amici Br. at 18 (note 12). Florida on the other hand does dispute this point taking the same position it did in its motion to dismiss. Florida's Br. at 5. Florida does not attempt to overcome the demonstration in Appellant's brief (pp. 21-22) which shows that by the term "instrumentality of foreign commerce" the Court has held that the term means the "means of commerce", and that the Court has held that fuel used for propelling a transport vehicle in commerce is an instrumentality of commerce.



Based on its analysis of the Containers Convention, the Court in *Japan Line* applied the "one voice" standard holding that the unilateral act of California taxing an instrumentality of foreign commerce of a foreign national used exclusively in international commerce interfered with federal national policy relating to international trade requiring uniform regulatory treatment and such state action was therefore unconstitutional. The Chicago Convention requires the same conclusion here: that Florida's taxing Appellant's aviation fuel used exclusively in international commerce is unconstitutional since it violates the Court's "one voice" doctrine.[9] Florida's tax conflicts with the national policy reflected in the Chicago Convention, and it is therefore unconstitutional.

## III. Florida And Local Taxing Amici Do Not Deny That The Federal Government Has Exclusive Powers Over Foreign Air Transportation, But They Argue That Since The Tax Is Not Specifically Prohibited, Florida Can Enforce It; That Argument Is Contrary To The *Japan Line* Decision.

Florida essentially parrots the position of the Florida Supreme Court: there is no federal requirement specifically prohibiting Florida's fuel tax on Appellant's jet fuel used exclusively in foreign air transportation services and therefore the tax is constitutional. Florida's Br. at 18-24. Local Taxing Amici presents a comparable argument.

Local Taxing Amici concedes (p. 11) that "Congress has expressly delegated to the Executive the power to enter

[9] There are other evidences in this case reflecting a national policy requiring the uniform regulation by the Federal Government without any interferences by the states or their political subdivisions, such as the ICAO resolutions (Appellant's Br. at 23), the many international air transport bilateral agreements between the United States and foreign nations (Appellant's Br. at 27-29), the State Department's policy letters to the Florida Department of Revenue (J.S.A. at A-82, A-87), and the Federal Aviation Act of 1958, as amended. Appellant's Br. at 34-44.

into international agreements concerning air transportation. 49 U.S.C. [secs.] 1462, 1502." It also concedes (p. 9) "that Congress has taken an extensive role in the regulation of aviation." Finally, Local Taxing Amici concedes (p. 27 (note 17)) that the Florida fuel tax to which Appellant objects could be specifically preempted through international agreements negotiated and executed by the State Department in conformity with the powers delegated to it by Congress through the Federal Aviation Act. However, until the Federal Government does take specific preemptive action, Local Taxing Amici argues, the individual states can move into foreign commerce areas not so preempted. Such arguments by Florida and Local Taxing Amici are not new to the Court. The appellee in *Japan Line* presented the Court with the identical argument: in foreign commerce involving relations with foreign governments, the state may intrude in areas not specifically preempted by the Federal Government. The Court summarily rejected such an argument:

> "We find no merit in this contention. The premise of appellees' argument is that a State is free to impose demonstrable burdens on commerce, so long as Congress has not preempted the field by affirmative regulation. But it long has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation . . . affords some protection from state legislation inimical to the national commerce . . . . Appellees' argument, moreover, defeats, rather than supports, the cause it aims to promote. For to say that California has created a problem susceptible only of congressional—indeed, only of international—solution is to concede that the taxation of foreign-owned containers is an area where a uniform federal rule is essential. California may not tell this Nation or Japan how to run their foreign policies." Quotation marks eliminated. *Japan Line,* 441 U.S. at 454-455.



That holding is as applicable here. Neither Florida nor the Local Taxing Amici may "tell this Nation . . . how to run [its] foreign policies."

**IV. The Canada Situation Demonstrates How Imperative It Is For The Federal Government To Be Unencumbered By State Interference In This Nation's Foreign Commerce Relationships.**

Most provinces of Canada impose a tax on aviation fuel uplifted from their storage facilities.[10] Only two exempt foreign airlines from the tax. Both Florida and the Local Taxing Amici seem to infer that this situation in some way supports their position. It does not. Rather, it dramatizes the need for the Federal Government to retain its exclusive power to resolve foreign relations problems unencumbered in any way by the unilateral actions of individual states. *Japan Line* 441 U.S. at 453. This point was succinctly stated by the United States in it brief supporting the position of Appellant (U.S. Br.II at 7-8):

> "The Canadian provincial taxes to which we have referred may cause international difficulties. Any problems they create, however, 'are problems that admit only of a federal remedy [and] do not admit of a unilateral solution by a State' (*Japan Line,* 441 U.S. at 457). If those taxes are said to breach reciprocity, it is the federal government, not the individual states, that must make the appropriate inquiry. And if those taxes are determined to breach reciprocity, it is the federal government, not the individual states, that is

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[10] Services between the United States and Canada are regulated in the charter field by the U.S./Canada Nonscheduled Air Service Agreement (See J.S.A. at A-58), and scheduled service by the U.S./Canada Air Transport Services Agreement, 17 U.S.T. 201, 205 (Jan. 17, 1966). The latter U.S./Canada agreement contains in its Article XI a similar exemption from the taxing of aviation fuel used in international air transportation services as is contained in Article XII of the U.S./Canada Nonscheduled Air Services Agreement.

alone capable of taking the diplomatic steps (including the adoption of any appropriate sanctions) necessary to effect a resolution."

The Federal Government is presently attempting to reach a solution to the problem with Canada. U.S. Br.II at 6. The United States airlines "fully support a diplomatic initiative with Canada" U.S. Br.II at 6. One of the principal United States airlines performing scheduled services between the United States and Canada, American Airlines, is participating along with Aer Lingus and many other foreign carriers in an amici brief supporting the position of Appellant.[11] The Federal Government has the exclusive power to seek a solution on behalf of the United States, and Florida or any other U.S. state should not be granted through a decision in this case the opportunity to interfere. See, *Japan Line*, 441 U.S. at 453.

**V. Section 1113 Of The Federal Aviation Act Does Not Grant To Individual States And Their Political Subdivisions Any Taxing Powers; Instead, It Preempts Some Of Their Taxing Powers.**

Both Florida and Local Taxing Amici refer to section 1113(b) of Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1513(b), as if that provision has some relevance to the issue of this case. It does not. That provision does *not grant* the individual states and their political subdivisions *any* taxing powers. It merely evidences the limits to the preemption by the Federal Government through subsection 1113(a) of the states' taxing power. It does no more than that, and this Court so held.

The Court in its decision, *Aloha Airlines* v. *Director of Taxation of Hawaii*, 464 U.S. 7 (1983), concluded that in

[11] While many U.S. schedule airlines filed suits opposing the Florida fuel tax, including carriers like Eastern Airlines and Delta Air Line that perform substantial U.S.-Canada scheduled service (See Nos. 84-901, 84-926 and 84-929), *no* U.S. airlines apparently has filed any suit in any court in Canada opposing any of the provincial fuel taxes.



1970 Congress passed the Airport and Airway Development Act of 1970, 84 Stat. 219, and the Airport and Airway Revenue Act of 1970, 84 Stat. 236, so that the Federal Government could assist states and their political subdivisions in expanding and improving airport and airway systems. Subsequently, in 1973, Congress passed the Airport Development Acceleration Act of 1973, 87 Stat. 88, in order

> "to provide increased Federal participation in airport development grants [which] is required because of the the serious financial difficulties being experienced by many local government agencies who bear the responsibility to build, operate and maintain the nation's system of publicly-owned airports." S. Rep. No. 93-12, 93d Cong., 1st sess. 4 (1973); see, H.R. Rep. No. 93-157, 93d Cong., 1st sess. 2-3 (1973).

The additional federal funding would come from federal taxes on passenger and freight air transportation services. *Aloha Airlines*, 464 U.S. at 9. Through section 7 of P.L. 93-44, a new section was added to the Federal Aviation act of 1958, section 1113[12]:

> "The legislation prohibits the levying of state or local head taxes, fees, or charges either on passengers or on the carriage of such passengers in interstate commerce. The provision is in response to a situation which has been brought about by an April 19, 1972

[12] The reason for including the preemption provision in the Federal Aviation Act was set forth in S. Rep. No. 93-12 at 25: "In view of the fact that the Federal Aviation Act of 1958 is the Act under which the Federal Government exercises its authority under the commerce clause of the Constitution to regulate air transportation, it is our opinion that an amendment to such Act would be the most appropriate method of exercising the authority to pre-empt State and local taxation of passengers engaged in air transportation in the interests of the needs and proper regulation of such transportation."

Supreme Court decision in *Evansville-Vanderburgh Airport Authority District et al.* v. *Delta Airlines*, [405 U.S. 707 (1972)]. . . .

"... The Court, in essence, ruled that states and cities could constitutionally impose a reasonable charge on interstate and intrastate air passengers in order to underwrite airport operational and development costs." S. Rep. No. 93-12, *supra*, at 17. See, H.R. Rep. No. 93-157, *supra* at 17. See, H.R. Rep. No. 93-157, *supra*, at 4-5.

Section 1113(a) of the Federal Aviation Act of 1958, prohibits states and their local subdivisions from levying and collecting head taxes or taxes on sales of transportation services by air, or the gross receipts so derived. The Court's *Aloha* decision, 464 U.S. at 12 (note 6), shows that *no new* taxing powers were granted to the states through section 1113(b):

"[Section] 1513(a) pre-empts a limited number of state taxes, including gross receipts taxes imposed on the sale of air transportation or the carriage of persons traveling in air commerce. [Section] 1513(b) *clarifies* Congress' view that the States *are still* free to impose on airlines and air carriers 'taxes other than those enumerated in subsection (a)'. . . ." Emphasis added.

Subsection 1113(b) "clarifies" what taxing powers are *left* to the states after the Federal Government preempted some of those taxing powers through subsection 1113(a). The states did not acquire taxing power in the foreign commerce area in issue in this case since 1113(b) grants no new taxing powers, and the states have never had any taxing powers in this strictly foreign commerce field. *Japan Line* v. *County of Los Angeles*, 441 U.S. 452 (1979).



## CONCLUSION

It is respectfully submitted that the decision of the Florida Supreme Court must be reversed.

Respectfully submitted,

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No. 84-902



IN THE
# Supreme Court of the United States
OCTOBER TERM, 1985

WARDAIR CANADA, INC.,
*Appellant,*
v.
STATE OF FLORIDA, DEPARTMENT OF REVENUE,
*Appellee.*

**On Appeal from the Supreme Court of the State of Florida**

# BRIEF OF AMICUS CURIAE AER LINGUS, AEROLINEAS ARGENTINAS, AERONAVES DE MEXICO, S.A., AEROVIAS NACIONALES DE COLOMBIA, S.A., ALIA-ROYAL JORDANIAN AIRLINES, ALITALIA-LINEE AEREE ITALIANE S.P.A., AMERICAN AIRLINES INC., BRITISH AIRWAYS PLC., BRITISH CALEDONIAN AIRWAYS LTD., CHINA AIRLINES LTD., COMPAGNIE NATIONALE AIR FRANCE, COMPANIA MEXICANA DE AVIACION S.A. dE C.V., DEUTSCHE LUFTHANSA AKTIENGESELLSCHAFT, EL AL ISRAEL AIRLINES LIMITED, EMPRESA ECUATORIANA DE AVIACION, FINNAIR OY, IBERIA AIRLINES OF SPAIN, ICELANDAIR, JAPAN AIR LINES COMPANY LTD., KLM ROYAL DUTCH AIRLINES, LINEAS AEREAS COSTARRICENSES, S.A., QANTAS AIRWAYS LIMITED, SCANDINAVIAN AIR LINES SYSTEM, SOCIETE ANONYME BELGE d'EXPLOITATION DE LA NAVIGATION AERIENNE, SWISS AIR TRANSPORT COMPANY LIMITED, TAP-AIR PORTUGAL, TRANSPORTES AEREOS NACIONALES, S.A., TRINIDAD & TOBAGO AIRWAYS CORPORATION, AND VIACAO AEREA RIO GRANDENSE, AMICI CURIAE

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## QUESTION PRESENTED

Whether an excise tax imposed by the State of Florida on aviation fuel purchased by foreign airlines for use exclusively in foreign air commerce unconstitutionally infringes upon the power of the Government of the United States to regulate foreign commerce.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES





## TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued





TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued



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This brief is filed pursuant to written consent of all parties to this case in accordance with Supreme Court Rule 36.2.

## INTEREST OF THE AMICI CURIAE

This case requires the Court to decide an issue of great importance to the international aviation industry—whether individual states (or, by extension, local governments) can impose excise taxes on aviation fuel used solely to power aircraft operated by foreign airlines in in international commerce when such taxes: (1) intrude into an area that must be governed solely by a single uniform policy established by the Federal Government, and (2) are contrary to well-settled Federal Government policies and accepted international standards. The *Amici Curiae* are a group of 29 international airlines whose operations will be directly affected by the decision of the Court in this case. Twenty-eight of them are foreign airlines representing 28 nations in Latin America, Europe, Asia, and the Middle East. Included in this group are carriers of virtually all of the major international trading partners of the United States. A number of these foreign carriers serve the State of Florida and thus will be directly affected by the decision of this Court regarding the Florida fuel tax. The remaining foreign carriers serve other points in the United States, and face the likelihood of state and local sales taxes on aviation fuel purchased in this country if this Court upholds the constitutionality of the Florida tax.

The *Amici Curiae* also include American Airlines, a United States carrier having substantial international operations. American currently is exempted from taxes on aviation fuel that might otherwise be imposed by local jurisdictions in foreign countries due to the reciprocal treatment that has traditionally been accorded foreign carriers in the United States.

A decision of this Court sustaining the Florida fuel tax would have significant adverse consequences to the *Amici*:



(1) It would permit other states and localities to impose similar taxes on purchases of aviation fuel used exclusively in international air transportation.

(2) It would create an atmosphere in which foreign nations are likely to take retaliatory action either by permitting their local governments to impose similar taxes or by imposing such taxes themselves in the belief that the reciprocity provided by the Federal Government on this issue is inadequate.

(3) It would shatter the international consensus carefully established over many years which provides for exemption of international airlines from such taxes on the basis of reciprocity.

The prospects of a proliferation of other state taxes and widespread retaliation by other countries are real. A number of other states and local jurisdictions have either adopted, or are contemplating adoption of taxes similar to the Florida tax.[1] Twenty-five foreign governments, including many of the most important international aviation trading partners of the United States, have submitted strongly worded diplomatic protests over the Florida tax, and a number of these notes have suggested the possibility of retaliatory actions.[2]

Perhaps the most pernicious effect of a decision sustaining the Florida tax would be its impact on the carefully crafted consensus of international reciprocity as a tool for dealing with the issue of the taxability of certain aspects of international air transportation. It has taken more than forty years for this international consensus to evolve, but the accepted—and almost universal—practice at the preesnt time is one of reciprocal tax exemptions

[1] *See* p. 6 *infra*.

[2] *See, e.g.*, Note No. 1679/E-375 of the Embassy of Colombia, Brief for the United States at 9a; Note of the Embassy of the Federal Republic of Germany, *Id.* at 21a; Note No. 106/84 of the Royal Norwegian Embassy, *Id.* at 43a.

for aircraft, equipment, and supplies, including aviation fuel. It is paradoxical in a sense that the case this Court has selected for review involves the appeal of an airline from the only country in the world that appears to allow aviation fuel taxes at other than the national level similar to the Florida tax whose validity is being challenged. However, the *Amici* firmly believe that the paradox is only an apparent one, and that the Canadian failure to accord American carriers reciprocal exemptions from provincial taxes on aviation fuel purchases underscores the basic point that it is the Federal Government—and the Federal Government alone—that must be charged with the task of resolving the problem posed by the Canadian tax and the breach it has created in the solid wall of international reciprocal exemptions.

This case raises delicate questions of international trade and international relations that can only be addressed and resolved by the Federal Government. The *Amici* believe that the invalidation of the Florida tax is an essential step to enable the Federal Government to deal with the problem of Canada's local taxes on aviation fuel purchased by foreign airlines in that country. Such a step by this Court would reaffirm the primacy of the Federal Government's policy of reciprocal tax exemptions for fuel and other consumable supplies purchased by foreign airlines for use in foreign commerce, and would make it clear that no State can impose a tax that would subvert that policy.

This Court has recognized that the United States must speak with one unified voice in conducting its international relations, *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), and that State taxes which either implicate foreign policy issues that must be left to the Federal Government or violate a clear federal directive are unconstitutional, *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983). The Florida fuel tax presents a specific instance where these principles must govern, and where the need and preroga-



tive of the Federal Government to deal with the international aspects of these taxes unhampered by unilateral State action must be recognized.

## FACTUAL STATEMENT

The essential facts in this litigation are not in dispute. For a number of years the State of Florida imposed excise taxes on fuel purchased by airlines within its borders. Until April 1983, however, this tax had no significant effect on foreign airlines largely because it was prorated on a mileage basis so that only fuel consumed within the State of Florida was taxed.[3] Since foreign airlines serving Miami—Florida's principal international gateway—enter Florida airspace only briefly, foreign airlines paid virtually no fuel tax during this period. The rational of this proration provision was explained by the Florida Supreme Court in *Tropical Shipping & Construction Co. Ltd. v. Askew*, 364 So. 2d 433, 435 (Fla. 1978) in the following terms:

> The purpose of the partial tax exemption is to prevent the State from exceeding its powers to tax interstate and foreign commerce. The proration formula was designed so that Florida would only tax that portion of commerce activity that occurred within the State.

This system was drastically revised, effective April 1, 1983. Under Senate Bill 8A[4] proration was eliminated for airlines, although maintained for other carriers.[5] The rate of tax was increased to 5.7 cents per gallon.[6] A special credit against income taxes, designed to favor large U.S. carriers based in Florida, was also added.[7]

[3] Fla. Stat. Ann. § 212.08(4) (West 1971).

[4] S.B. 8A, 1983 Regular Sess., 1983 Fla. Laws c. 83.

[5] Fla. Stat. Ann. § 212.08(4)(a)(2) (West Supp 1985).

[6] Technically the rate is five percent of a hypothetical price of $1.148 per gallon. *Id.* at §§ 212.62(b), (c).

[7] *Id.* at § 220.189.

The Florida fuel tax is at the vanguard of an effort by a number of State and local governments to tax purchases of international aviation fuel. Since this tax was adopted, the State of Illinois has established new tax burdens on aviation fuel purchased by foreign airlines through the reversal of a long standing administrative ruling.[8] Under color of enabling legislation passed by the Massachusetts legislature, the City of Boston has imposed taxes on fuel purchases at Logan International Airport.[9] The State of California [10] and the City of Chicago [11] also are currently considering taxes on aviation jet fuel. While this litigation concerns only the Florida fuel tax, the decision in this case clearly will have repercussions throughout the nation.

Except for American Airlines, *Amici* are all companies established under the laws of their foreign home countries, and are designated and licensed by those countries to serve the United States. All have been concurrently authorized by the Federal Government (first the Civil Aeronautics Board, more recently the Department of Transportation) to serve the United States.[12] None of

[8] Ill. Admin. Reg. § 130.2080(c) (1984).

[9] Mass. Act of July 1, 1985, ch. 145.

[10] A.B. No. 2419, 1985-86 Sess. (1985).

[11] Substitute Ordinance, December 1, 1985 (Alderman Vrdolyak).

[12] The foreign carrier *Amici*, and the orders of the Civil Aeronautics Board or Department of Transportation issuing their current permits are listed below: Aer Lingus Order 74-3-34 (1974); Aerolineas Argentinas, Order 77-12-53 (1977); Aeronaves de Mexico, S.A., Order 78-5-184 (1978); Aerovias Nacionales de Colombia, S.A., Order 78-10-135 (1978); Alia-Royal Jordanian Airlines, Order 79-10-15 (1979); Alitalia-Linee Aeree Italiane S.P.A., Order 71-4-1 (1971); British Airways PLC, Order 84-3-121 (1984); British Caledonian Airways Ltd., Order 82-12-118 (1982); China Airlines Ltd., Order 85-2-73 (1985); Companie Nationale Air France, Order 81-8-135 (1981); Compania Mexicana de Aviacion, S.A. de C.V., Order 78-6-127 (1978); Deutsche Lufthansa Aktiengesellschaft, Order 81-8-135 (1981); El Al Israel Airlines Limited, Order 84-6-44 (1984); Empresa Ecuatoriana de Aviacion, Order 84-5-32 (1984); Finnair Oy, Order 81-4-91 (1981); Iberia Airlines of Spain, Order 73-6-21 (1973); Iceland-air/Flugleider, H.F., Order 80-1-2 (1980); Japan Air Lines Company, Ltd., Order 81-8-135 (1981); KLM Royal Dutch Airlines, Order 81-8-135 (1981); Lineas Aereas Costarricenses, S.A., Order 80-4-148 (1980); Qantas Airways Limited, Order 81-4-92 (1981); Scandinavian Air Lines System, Order 81-8-135 (1981); Societe Anonyme Belge d'Exploitation de la Navigation Aerienne, Order 81-8-135 (1981); Swiss Air Transport Company Limited, Order 71-5-21 (1971); Tranportes Aereos Nacionales, S.A., Order 82-6-98 (1982); TAP-Air Portugal, Order 79-8-47 (1979); Trinidad & Tobago Airways Corporation, Order 82-1-7 (1982). Viacao Aerea Rio Grandense, S.A. currently operates pursuant to an exemption issued by the Department of Transportation, Order 85-12-16 (1985).



the foreign carriers can operate domestic services within the United States, except under highly unusual circumstances.[13] Each of the foreign carriers is headquartered in its respective foreign country and is substantially owned and effectively controlled by the government or by nationals of that country.[14] Each purchases substantial amounts of aviation fuel in the United States. Those carriers that serve Miami International Airport are subject to the Florida fuel tax. The other *Amici* face the likelihood of similar taxes elsewhere in the United States. All of the foreign carrier *Amici* are exempt from federal taxes on fuel, and from customs duty on fuel and lubricants due to the existence of reciprocal arrangements between the United States and their home countries.[15]

Each of the *Amici* operates internationally under the general framework established by the Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, 61 Stat. 1180 *et seq.* ("the Chicago Convention"). The details of operations in particular markets are governed by a series of bilateral executive agreements, except in the cases of Brazil and Honduras where aviation relationships with the United States are based on interna-

[13] 49 U.S.C. § 1508 (1982).

[14] *See* orders cited in n.12 *supra*.

[15] 26 U.S.C. §§ 4221(a), (d)(3) (1982 and Supp II 1984); 19 U.S.C. §§ 1309(a), (d) (1980), 19 C.F.R. § 10.59 (1985).

tional comity and reciprocity.[16] With minor variations in language not presently relevant, the bilateral agreements applicable in each of the foreign carrier *Amici*'s markets provide for exemptions from national duties and charges on aviation fuel for the foreign carriers on the basis of reciprocal treatment for United States carriers.[17]

The more modern bilateral agreements, including those with Belgium, Costa Rica, Israel, and the United Kingdom provide further that the United States will use its best efforts to seek exemption for foreign air carriers from state and local fuel taxes.[18] None of the home countries of the foreign carrier *Amici* tax aviation fuel purchased by United States airlines at any level of government.

## ARGUMENT

### I. There are Established Constitutional Standards for Testing State Taxes Affecting Foreign Commerce that Should be Applied in this Case

The point of departure for the analysis of state tax legislation under the Commerce Clause is this Court's decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Reversing a line of previous cases that invalidated state taxes "on the privilege" of doing interstate business, and consolidating rulings in a number of more recent decisions, the Court laid down two general rules regarding the taxation of interstate commerce. The first was that state taxes will be judged not by their formal legal language, but rather by their practical effect on commerce. Those taxes which have the effects that the Commerce Clause forbids will be held invalid no matter

[16] *See* Civil Aeronautics Board Order 82-6-98 (1982); and Department of Transportation Order 85-12-16 (1985).

[17] *See, e.g.*, Air Transport Agreement, October 24, 1956, United States-Colombia, 14 U.S.T. 429, T.I.A.S. 5338; Air Transport Agreement, April 3, 1957, United States-Netherlands, 12 U.S.T. 837, T.I.A.S. 4782.

[18] *See* Appendix.



what technical formulation is used. 430 U.S. at 288-89. Secondly, *Complete Auto* laid down the four basic tests applicable to taxes affecting interstate commerce. These are whether the tax is applied to an activity with a substantial nexus to the taxing state, whether there is fair apportionment of the tax, whether the tax discriminates against interstate commerce, and whether the tax is fairly related to services provided by the state.[19]

The *Complete Auto* decision involved interstate commerce only. It was not until some two years later in *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979) that this Court began articulating the modern test under the Commerce Clause for taxes affecting foreign commerce. At issue in *Japan Line* was an *ad valorem* property tax imposed by the State of California upon shipping containers owned by foreign companies, based and registered abroad, and used exclusively in international commerce. The Court assumed that the four part test of *Complete Auto Transit* was satisfied. It went on to conclude that:

> When construing Congress' power to "regulate Commerce with foreign Nations," a more extensive constitutional inquiry is required.

441 U.S. at 446.

The Court outlined two additional tests that must be met when state taxation of international commerce is at issue. One was the enhanced risk of international multiple taxation. The Court recognized the established constitutional principle that multiple taxation offends the Commerce Clause,[20] and pointed additionally to the sensitive international concerns that overlapping international taxes can raise.[21] While domestic problems of multiple state taxation can be dealt with through apportionment

[19] 430 U.S. at 287 (1977).

[20] 441 U.S. at 451, 454.

[21] 441 U.S. at 456.

requirements, the Court pointed out that there was no authority in a position to require international apportionment.[22] It therefore held that state taxes which create a substantial risk of international multiple taxation are themselves invalid under the Commerce Clause.[23]

The second *Japan Line* consideration was whether the state tax impairs federal uniformity in an area where such uniformity is essential. The preeminent role of the Federal Government in foreign affairs has long been recognized in judicial decisions.[24] The Court pointed out that the Commerce Clause, in particular, has been interpreted to give broader authority to the Federal Government with regard to foreign commerce than to interstate commerce.[25] The Court also noted that state taxes can have implications for the country's international relations:

> "A state tax on instrumentalities of foreign commerce may frustrate the achievement of federal uniformity in several ways. If the State imposes an apportioned tax, international disputes over reconciling apportionment formulae may arise. If a novel state tax creates an asymmetry in the international tax structure, foreign nations disadvantaged by the levy may retaliate against American-owned instrumentalities present in their jurisdictions. Such retaliation of necessity would be directed at American transportation equipment in general, not just that of the taxing State, so that the Nation as a whole would suffer. If other States followed the taxing State's example, various instrumentalities of commerce could be subjected to varying degrees of multiple taxation,

[22] 441 U.S. at 447-48.

[23] 441 U.S. at 451.

[24] *See, e.g., United States v. Pink*, 315 U.S. 203, 233 (1942); *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889); L. Tribe, *American Constitutional Law* 172 (1978).

[25] 441 U.S. at 454.



> a result that would plainly prevent this Nation from 'speaking with one voice' in regulating foreign commerce."

441 U.S. at 450-51.

Although the Court stated in *Japan Line* that a state tax that violated either of these precepts was unconstitutional under the Commerce Clause, it found that the specific tax at issue in that case violated both tests. First it found that actual multiple taxation existed, because the containers in question were fully taxed in Japan in a manner which accorded with established international practice.[26] Secondly, the Court found that the ability of the United States to speak with one unified voice in its international commercial relations was impaired. In making this determination, the Court pointed to the Customs Convention on Containers [27] which, while not applicable by its terms to the tax in question, evidenced a national policy favoring the removal of impediments to the use of cargo containers in international trade.[28] The Court also noted the risk of retaliation by Japan in response to this tax, and the possibility of inconsistent levies in other states as further demonstrations of the impairment of federal uniformity.[29] The Court therefore held the California property tax unconstitutional as applied.

The *Japan Line* tests received further amplification barely two years ago by this Court in *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159 (1983), in which the Court upheld the application of California's unitary business income tax to a United States corporation with operations in foreign countries.

[26] 441 U.S. at 454.

[27] Customs Convention on Constainers, May 18, 1956, 20 U.S.T. 301, *et seq.*

[28] 441 U.S. at 453.

[29] *Id.*

Most significant to the present case is *Container Corporation*'s refinement of the federal uniformity analysis. This aspect of the *Japan Line* criteria was divided into two subtests. The first is "whether the tax in question implicates foreign policy issues which must be left to the Federal Government" and the second is whether the tax "violates a clear federal directive." 463 U.S. at 194. The Court found that the California unitary income tax met both of these requirements.

*Amici* believe that the uniformity test laid down by *Japan Line* and developed further in *Container Corporation* is the key to the proper disposition of this case. The Florida fuel tax clearly intrudes into an area where federal uniformity is essential, implicates foreign policy issues that must be left to the Federal Government, and is flatly inconsistent with well established federal policy. For these reasons it must be invalidated.

**II. The Florida Fuel Tax Intrudes into an Area Where Federal Uniformity is Essential**

Since international aviation began to play a major role in world commerce about forty years ago, a consensus and uniform practice among nations has developed that international airlines should be exempt from taxation at all levels of government with respect to fuel, lubricants, aircraft stores, and other consumable technical supplies for their aircraft. This consensus has found expression in a number of differing ways.

Perhaps the most striking is the virtually uniform practice of nations in exempting fuel from tax at all levels of government. In the series of diplomatic notes appended to the *Amicus Curiae* brief of the United States virtually all of the major aviation trading partners of the United States, and all of the home countries of the foreign carriers presenting this brief state their acceptanec of this policy.[30] This practice is invariably followed at all

[30] *See, e.g.*, Note of the Embassy of France, Brief for the United States, Appendix, at 18a; Note of the Embassy of Trinidad & Tobago, *Id.* at 53a; Note No. 190 of the Embassy of the United Kingdom, *Id.*, at 57a.



levels of government by countries having federal systems (*e.g.*, Notes of Mexico and the Federal Republic of Germany) or which otherwise allow the imposition of taxes at local levels (*e.g.*, India, Brief for the United States as *Amicus Curiae* at 13, n.6). The established custom of nations has long been recognized as a source of international law,[31] and plainly the established international legal rule favors exemption from tax on the basis of reciprocity.

This policy has also found more formal expression through the Chicago Convention and the actions of the International Civil Aviation Organization. Article 24(a) of the Convention provides that "fuel, lubricating oils, spare parts, regular equipment and aircraft stores onboard an aircraft" of one of the contracting parties engaged in international operations must "be exempt from customs duty, inspection fees, or similar national or local duties and charges." 61 Stat. 1186.

The International Civil Aviation Organization ("ICAO") was established by the Chicago Convention. The United States is an active member of this organization. More than thirty years ago, the Air Transport Committee of ICAO determined that the Convention did not deal completely with the area of international taxation, and undertook a thorough study of this question. *ICAO's Policies on Taxation in the Field of International Air Transport*, ICAO Doc. 8632-C/968, at 1 (Nov. 1966). This document, in turn, served as the basis for a resolution adopted by the ICAO Council on November 14, 1976 which stated that:

> "Fuel, lubricants and other consumable technical supplies taken onboard for consumption during flight shall be further exempt from all customs and other

[31] *See, e.g.*, *The Paquette Habana*, 175 U.S. 677, 700 (1900); Restatement of Foreign Relations Law of the United States § 102 (1)(a) (Tent. Draft No. 1, 1980); M. Whiteman, I *Digest of International Law*, 75-90 (1963).

duties or, alternatively, all such duties levied shall be refunded . . . ."

*Id.* at 4.

The term "customs and other duties" was specifically defined to include excise, sales, consumption and other internal taxes levied upon fuel, lubricants, and other consumable technical supplies by any taxing authority within a state. *Id.*

The United States has benefited from being part of this international consensus because it has eliminated potential taxes on all U.S. international carriers. If the United States is to continue as part of this established system, it must have a uniform national policy that aviation fuel used or purchased by foreign airlines in the United States is not subject to state or local taxation where reciprocal privileges are granted to U.S. carriers. To permit states to intrude into this area unilaterally is to make United States' participation in such a system of reciprocal exemptions impossible. As the Court noted in *Japan Line*, this type of tax inevitably will lead to retaliatory taxes from other nations with federal systems, and from countries that are dissatisfied with the degree of reciprocity offered by the United States. That retaliation will, of necessity, be against all United States carriers, and not simply those based in Florida.[32] The series of diplomatic notes appended to the Brief of the United States leaves no doubt that the United States carriers would face retaliation in many countries if the Florida fuel tax is allowed to stand.[33]

The only exception to this general system known to *Amici* is Canada, where apparently some taxes are imposed by provincial governments on aviation fuel. The case of Canada is a forthright demonstration of the importance of federal uniformity in this area. Although Canada's allowance of local taxes on international aviation fuel may be an international anomaly, only the Federal Government is in a position to deal with this departure from the international norm of reciprocity. There is no way the State of Florida, or any other state, can deal with the imposition of fuel taxes at the provincial level in Canada. Obviously, only the United States Federal Government can conduct diplomatic negotiations and seek clarification of Canada's policy and assurances that U.S. carriers will not be so taxed. It is equally obvious that the fact that Florida and, potentially, other local jurisdictions within the United States purport to impose taxes on aviation fuel purchased by international airlines severely undercuts the position of the United States in dealing with the Canadian authorities.

In particular, the existence of state taxes in this country would make it impossible for the United States to offer exemption from taxes in this country for Canadian carriers as a *quid pro quo* for analogous treatment for United States carriers in Canada. It is exactly this type of exchange which has been the foundation of the existing international policy of reciprocal exemption. Because the existing international consensus rests on the rock of reciprocity, the Federal Government must be in a position to approach other nations that deviate from this consensus with a single-minded policy that only it can express. A state tax that frustrates such an effort clearly implicates foreign policy issues that must be left to the Federal Government.

### III. The Florida Fuel Tax Directly Contradicts the Foreign Policy of the United States

The Florida fuel tax also fails the second portion of the uniformity test in that it expressly contradicts firmly established United States policy.

As the *Amicus Curiae* brief submitted on behalf of the United States clearly points out, it is, and has been for many years, the policy of the United States that international airlines should be exempt on the basis of reciprocity from any taxes on fuel, lubricants, and consum-

[32] 441 U.S. at 453.

[33] *See*, n.2, *supra*.

able technical supplies. (*See* Brief for the United States at 10-22.) The manifestations of this policy are numerous. First is the Chicago Convention and the policies adopted by the International Civil Aviation Organization, described above. The United States is a party to the Convention, and a member of the ICAO.

Next is the uniform and extensive network of bilateral agreements into which the United States has entered. As discussed in more detail in the Brief for the United States, bilateral agreements entered into by this country since the end of the Second World War have uniformly contained language committing each party to exempt airlines of the other from taxes on fuel, lubricants, and consumable technical supplies, on a basis of reciprocity. By their terms most of these provisions apply only to national duties and charges. However, as the Brief for the United States observes, in this respect the bilateral agreements do not reflect the full scope of the United States aviation policy. *Id.* at 17. The reasons for this are mostly historical. In the earlier days of aviation, most international airlines used bonded fuel exclusively, which is clearly exempt from all state taxation.[34] When bonded fuel became unavailable, carriers found that the limited number of jurisdictions which had direct international services typically either impose no tax at all on fuel used in international services, or proportioned the tax on the basis of mileage (as did Florida) so that the economic burden became insignificant. It is only in recent years, when the number of destinations within the United States served by foreign carriers has increased and the volume of non-taxable bonded fuel has decreased, that states have made more determined efforts to tax aviation fuel. Thus it is only recently that state fuel taxes have become matters of serious concern for foreign airlines.

Additionally, many of the most recent United States bilateral agreements deal specifically with the subject of state and local fuel taxes. Starting with the so-called

[34] *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414 (1940).



Bermuda II Agreement between the United States and the United Kingdom in 1977,[35] recent agreements have commonly included provisions requiring the United States to use its best efforts to obtain exemptions for foreign carriers from state and local taxes.[36] As the Solicitor General observes, this is a strong indication of United States policy in this area. (Brief at 20.) That foreign nations have interpreted these provisions as demonstrating a clear policy commitment is reflected in the terms of the numerous diplomatic notes appended to the Solicitor General's brief.[37]

A third manifestation of this policy is found in statements made by federal officials directly to the State of Florida. Prior to the enactment of the 1983 tax legislation, the State Department wrote to the State of Florida noting concerns expressed by foreign governments regarding the appropriateness of imposing certain taxes on foreign air carriers "in view of the generally-accepted and long standing international practice of reciprocally exempting such items from taxes."[38] The State Department also noted that some nations have raised the possibility of retaliatory taxation which would frustrate the reciprocal system of international tax exemptions. The Florida Department of Revenue responded to the State Department in reassuring terms, noting the generous

[35] Air Services Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, July 23, 1977, 28 U.S.T. 5367, T.I.A.S. 8641, Art. 8(5).

[36] *See, e.g.*, Air Transport Agreement, October 23, 1980, United States-Belgium, T.I.A.S. 9903; Air Transport Agreement, November 23, 1983, United States-Costa Rica, T.I.A.S. ——; Protocol to Air Transport Agreement, United States-Israel, August 16, 1978, 29 U.S.T. 3144, T.I.A.S. 9002.

[37] *See*, notes 2 and 30, *supra*.

[38] Letter dated September 29, 1982 to Executive Director of State of Florida Department of Revenue from Deputy Assistant Secretary of State for Transportation and Telecommunications (J.S. App. A-82).

treatment that Florida accorded to foreign carriers, and stating that Florida recognized the importance of international aviation.[39] When the tax was proposed early in 1983, the State Department again wrote to the Department of Revenue expressing its surprise at the proposal and proposing that the legislation incorporate the concept of reciprocal exemption from tax. Failing this, the Department of State expressed concern about "serious foreign relations problems," if the tax were imposed.[40] It is not often that a party contemplating actions which raise constitutional questions receives a direct and unambiguous indication of the policy of the United States. Yet this is exactly what happened here. Unfortunately, the State of Florida disregarded that statement of policy in enacting the fuel tax, and has studiously ignored Federal policy throughout all of the litigation regarding the Florida fuel tax.

A final demonstration, if one is needed, lies in the actions that the United States has regularly taken in foreign countries to protest possible taxation of aviation fuel, and to secure exemptions based on reciprocity for United States carriers. (*See* Brief for the United States at 20.) Protests by the United States of fuel taxes in foreign countries can only have a very hollow ring if state taxes on aviation fuel, such as that imposed by Florida, are allowed to stand in this country.

In summary, the Florida fuel tax is clearly unconstitutional under the federal uniformity standards established by *Japan Line* and *Container Corporation*. Taxation of international airline fuel is inherently an area where a uniform federal policy is required in order to secure for United States carriers the benefit of reciprocal exemptions from tax in foreign countries. The Florida tax intrudes impermissibly into this sensitive area of international relations. At the same time, Florida directly and knowingly has contradicted the express policy of the United States in the international area. If the Florida tax is not held unconstitutional, the conduct of the foreign relations of the United States by the United States Government in this area will be seriously impaired.

[39] Letter dated October 25, 1982 to Deputy Assistant Secretary of State for Transportation and Telecommunications from Executive Director of State of Florida Department of Revenue (J.S. App. A-85).

[40] Letter dated March 7, 1982 [1983] to Executive Director of State of Florida Department of Revenue from Deputy Assistant Secretary of State for Transportation and Telecommunications, (J.S. App. A-87).



### IV. The Florida Fuel Tax is Essentially Similar to the Tax Disapproved in *Japan Line*

While this Court applied the *Japan Line* precepts to the California unitary income tax in *Container Corporation*, it concluded that California's tax was constitutional. The reasons for the Court's holding on that specific point do not, however, apply to the present case.

In *Container Corporation*, the Court found no automatic asymmetry between the California unitary tax, and the "arms' length" approach to international tax accounting questions advocated by the Federal Government. It noted that any conflict between taxing regimes was not inevitable and depended on specific rulings regarding the application of allocation formulae to particular cases. Similarly, the Court found that there was no acceptable "bright line" rule that would avoid this conflict.

Those considerations do not apply to this case. The symmetry that has been established through years of international practice and negotiations is that of reciprocal exemption from tax. The very existence of the Florida tax undercuts that structure and creates an asymmetry that operates to the disadvantage of foreign countries. This is precisely the type of problem that the Court had in mind when it established the federal uniformity requirement under *Japan Line*. 441 U.S. at 453. The Florida tax is a flagrant disruption of a balanced system of reciprocal exemptions. The "bright line rule" to rem-

edy this problem is, of course, to forbid states from any taxation of foreign airline fuel purchased for use in international air transportation. The reciprocal exchange of exemptions on which this approach is based make this rule fair for the United States, and for the State of Florida.

A second major consideration in upholding the California unitary business tax in *Container Corporation* was the fact that the tax burden fell on United States domestic corporations. This is clearly not the case here. The actual taxpayers in this and the companion cases that the Court has not yet decided to review are all companies established under the laws of foreign nations with their principal base of operations in foreign countries. They are uniformly owned and controlled by nationals of their home countries. Indeed, a substantial number of them are owned and controlled directly by foreign governments.[41] The point of this portion of the *Container Corporation* analysis was, of course, that foreign nations have little or no reason to be concerned over the tax treatment given by the United States to its own domiciliary companies. However, where the companies are owned by foreign nationals or their *governments*, the reasons for concern are particularly strong. The substantial number of diplomatic notes sent to the United States concerning the Florida fuel tax show that this concern is real.

The Court also noted that Container Corporation was clearly subject to income tax in California and that the amount of that tax depended as much or more on tax rates as on the technical definition of the income base. Again, this argument does not apply to the present case. The point here is that any tax on aviation fuel raises serious reciprocity issues. The issue is not what portions

[41] For example, Aerolineas Argentinas, Aeronaves de Mexico, S.A., Compania Mexicana de Aviacion, S.A. de C.V., Empresa Ecuatoriana de Aviacion, Trinidad & Tobago Airways Corporation and Viacao Aerea Rio-Grandense, S.A. are all either majority or wholly-owned by their respective governments.



of such fuel should be taxed. The established international rule is that none of it should be.

Lastly, the Court pointed to the distinctions between the property tax involved in *Japan Line* and the income tax at issue in *Container Corporation.* In particular, the Court focused on the fact that situs-based rules traditionally play a much larger role in the property tax area than with respect to income taxes, particularly in view of the difficulties that governments often face in allocating income among the component parts of a single multinational enterprise.

Once again, this distinction does not apply here. Excise taxes such as that imposed by Florida have always been strongly situs-based since they typically focus on a single transaction and the location of that transaction. Thus this Court has held that a state may not tax a sale that takes place outside of its borders.[42] Similarly, the Court has recognized that compensating use taxes must be limited to taxable uses within the confines of the state.[43] Indeed the arguments advanced by the State of Florida and the Solicitor General that true multiple taxation cannot take place in this case because the taxable transaction —the sale of the fuel—takes place only in Florida underscore this very point.[44] Situs factors are of much greater relevance to Florida's excise tax than to the income tax at issue in *Container Corporation.*

### V. The Florida Tax is Subject to Scrutiny Under the Commerce Clause

During the course of litigation regarding the fuel tax, Florida has argued that its tax is not really a tax on

[42] *See, e.g., National Bellas Hess Inc. v. Department of Revenue,* 386 U.S. 753, 756-58 (1967); *Miller Bros. Co. v. Maryland,* 347 U.S. 340, 344-45 (1954).

[43] *See, e.g., Scripto, Inc. v. Carson,* 362 U.S. 207, 210-11 (1960); *General Trading Co. v. State Tax Comm'n of Iowa,* 322 U.S. 335, 337-38 (1944).

[44] Brief for the United States at 30; Appellee's Reply Brief to *Amicus Curiae* at 3-4.

aviation fuel, and that even if it is viewed as a fuel tax, fuel is not an instrumentality of commerce subject to the rule of *Japan Line*. Florida first contends that the Florida tax is not imposed upon aviation fuel, and that airlines do not pay it. Instead, in the view of the State of Florida, this tax is strictly an excise on the withdrawal of fuel from storage by fuel vendors located in that state. Factually this contention is completely wrong. Legally, it is irrelevant.

For one thing, the terms of the Florida fuel tax completely undercut the State's argument. The Florida legislature stated its intention in enacting the fuel tax in the following terms:

> It is the intent of the Legislature that sales of motor fuel and special fuel shall be subject to the tax imposed by this chapter. However, in recognition of the unique business practices which characterize the sale of such fuel at the retail level, and of the existing public and private sector administrative structures which exist pursuant to Chapter 206 for the collection of motor fuel and special fuel excise tax, the Legislature hereby provides a method for imposing and collecting the sales tax on such fuel in a manner least likely to increase public and private costs of tax collection and administration.

Section 212.60(1) Laws of Florida.

In other words, the legislature's goal is to tax fuel. The existing administrative structure, involving collection of the tax by fuel retailers, was kept intact, however, as a matter of administrative convenience. As stated more specifically in Section 212.70(2)(a) of the law:

> This levy of tax is upon the ultimate retail consumer. It is hereby provided as a matter of administrative convenience and necessity that the tax shall be paid upon the first sale or transfer of title within this State whether by a distributor, dealer, or retail dealer, *who shall act as agent for the State in the collection of said tax* whether such distributor, dealer, or retail dealer is the ultimate seller or not.



The statutory role of dealers as agents for the state collecting this tax from the ultimate consumer (i.e., the carriers) is reaffirmed by provisions of Florida law requiring this tax to be passed on to the consumer, and separately identified in billings (Florida Statutes § 212.70 (2)(b)), forbidding retailers from claiming that they will absorb the tax (§ 212.70(2)(c)) and providing for misdemeanor penalties if either of these requirements is not met (§ 212.70(2)(d)). The law that the State of Florida is attempting to defend belies its central argument. There is no question that what is being taxed here is aviation fuel, and that the taxpayer is the foreign air carrier.

Even if this Court were to accept the State of Florida's construction of the tax, the Commerce Clause precepts of *Japan Line* and *Container Corporation* would still apply fully. The central holding of *Complete Auto Transit* was that rigid formalistic approaches will no longer be used in evaluating state taxes under the Commerce Clause. Instead, the Court will examine the practical effects of those taxes, and determine if those effects are inconsistent with Commerce Clause requirements.[45]

The court elaborated on this holding in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981). At issue in that case was the constitutionality of a severance tax imposed by the State of Montana on the removal of coal from that state's mines. The Montana Supreme Court, relying on *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922) held that the tax was imposed on the severance of coal, a purely intrastate activity preceding entry of the coal into interstate commerce.

This Court refused to accept the Montana Court's analysis. Instead it noted that *Heisler*, like the cases relied upon by the State of Florida[46] were based on an out-

[45] 430 U.S. at 249.

[46] *Nashville, Chatanooga, and St. Louis Ry. v. Wallace*, 288 U.S. 249 (1933); *Eastern Air Transport, Inc. v. Tax Comm'n*, 285 U.S.

moded view of the law, dating from a time when interstate commerce was held completely immune from taxation, and not liable to "pay its own way". 453 U.S. at 616. As a result the Court held:

> ". . . that a state severance tax is not immunized from Commerce Clause scrutiny by a claim that the tax is imposed on goods prior to their entry into the stream of interstate commerce. Any contrary statements in *Heisler* and its progeny are disapproved. We agree with appellants that the Montana tax must be evaluated under *Complete Auto Transit's* four part test.

453 U.S. at 616 (footnote deleted).

The similarity of the Montana statute's language taxing the "severance" of coal to the language of the Florida statute taxing the "withdrawal from storage" of aviation fuel is obvious. So is the similarity of the practical effects of these two taxes. Both have a clear practical effect on federally regulated commerce. Both are therefore subject to scrutiny under the Commerce Clause.

A second argument advanced by the State of Florida is that fuel is not an instrumentality of commerce. Presumably, as a result, the *Japan Line* rule would not apply to taxation of aviation fuel.

Again this argument lacks factual basis. This Court has long recognized the common sense proposition that fuel is vital to interstate and foreign commerce and, most particularly, to transportation. For example, in *Helson and Randolph v. Kentucky*, 279 U.S. 245 (1928) the Court considered the validity of a use tax imposed by Kentucky on fuel purchased out of state and consumed by ferry boats operating within that state in interstate commerce. The court held this tax unconstitutional reasoning in part that:

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147 (1932); *Edelman v. Boeing Air Transport, Inc.*, 289 U.S. 249 (1933); *United Aid Lines, Inc. v. Mahin*, 410 U.S. 623 (1973).



> "The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. It reasonably cannot be distinguished from a tax for using a locomotive or a car employed in such commerce. A tax laid on the use of the ferry boat would present an exact parallel. And is not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax which falls directly upon the use of one of the means by which commerce is carried on directly burdens said commerce. If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this Court definitely has held, it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transaction is effected." 279 U.S. at 252.

The fuel used in propelling the airplanes of *Amici curiae* is every bit as much an instrumentality or means of international commerce as the fuel that powered the ferry boats at issue in *Helson*.[47] As the Florida Trial Court quite properly concluded in a companion case to the present litigation, fuel is the "*sine qua non*" of international aviation.[48]

### VI. There is no Basis for Florida's Contention that its Tax Does Not Violate Federal Policy

Florida also argues persistently that there is no federal policy which this fuel tax violates. Presumably Florida would have this Court believe that the Solicitor General of the United States in an *Amicus Curiae* brief prepared in cooperation with the Legal Adviser of the Department of State and the General Counsel of the Department of Transportation misstates this country's foreign policy. Obviously, the *Amicus Curiae* Brief for the United States reflects the official position of the United States as articulated by those who are responsible for establishing that

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[47] *See also United Air Lines v. Mahin*, 410 U.S. 623, 636 (1973, Douglas J., dissenting).

[48] *Lineas Aereas Costarricenses, S.A. v. State of Florida, Dept. of Revenue* (No. 84-922) (J.S. App. A-25, 33).

position and who deal with these issues in the international arena on a day-to-day basis.[49]

The State of Florida and a bare majority of the Florida Supreme Court have seized upon the one portion of the record that, when viewed superficially, favors their point of view. The focus of this myopic analysis has been the fact that the standard bilateral aviation agreements expressly prohibit only national duties and charges on fuel. Florida uses this as evidence that the Federal Government has already taken the position that state taxes of the type at issue in this case are constitutionally permissible. That conclusion cannot stand against the overwhelming evidence of an express federal policy that the Florida approach ignores. Moreover, the conclusion that the Florida Supreme Court draws from its analysis of the bilateral agreements is without validity even when considered on its own merits. *Amici* believe there is no basis for the presumption that the absence from an older bilateral of a specific exemption from state taxes gives Florida, or any other state, *carte blanche* to impose such taxes.

In *Japan Line*, for example, the Court noted that a multilateral convention concerning shipping containers did not provide exemption from state taxes.[50] This did not prevent the Court from invalidating the California state tax on Commerce Clause grounds. Indeed, it relied upon the Convention as evidence of a federal policy.[51] If the reasoning of the Florida Supreme Court were to be followed to its logical conclusion, the states would be free to impose any kind of tax on the fuel, provisions, or aircraft of foreign airlines as long as such taxes were not specifically exempt from taxation by a bilateral air transportation agreement. This is clearly not the law as

[49] The difference between this case and *Container Corporation*, where no brief was filed by the United States, is also manifest.

[50] 441 U.S. at 446, n.10.

[51] 441 U.S. at 452-53.



set forth in *Japan Line*. The court below failed to recognize that it is the Commerce Clause of the Constitution, and not simply the implications that might be drawn from the terms of the bilateral aviation agreements, that precludes Florida from applying its fuel tax to the purchase of fuel by foreign-owned and foreign-based airlines.

Even if there were some merit in the analysis of the court below regarding the reach of the tax clauses of some of the bilateral agreements, the Florida Supreme Court and the State of Florida have failed totally to recognize that the cited tax clauses of the bilaterals are only one source of United States international aviation policy. The historical reasons for the scope of the tax provisions of some bilateral agreements are clearly explained in the Solicitor General's brief. It is manifest that these provisions by themselves do not reflect the full ambit of United States policy and the international consensus of which it is a part. Rather that policy and consensus are entwined in the pervasive web of international arrangements in the aviation area such as the best efforts language of many bilaterals, the correspondence between the Department of Revenue and the Department of State, the Chicago Convention, the ICAO Resolutions, the efforts by the United States to negotiate tax reductions for U.S. carriers, and the diplomatic notes submitted by twenty-five foreign countries. This overwhelming evidence of a federal policy and an international consensus simply cannot be wished away.

A related argument is that the bilateral provisions and the ICAO Resolutions address discrimination in taxation, and that the Florida fuel tax does not discriminate since it treats all carriers equally.[52] Similarly, the state contends that the fuel tax creates no international asymmetry.

[52] This, of course, was not true of the original Florida fuel tax. Only when the Florida Supreme Court struck down the invidious income tax credit favoring United States carriers could this argument be seriously made.

This argument is easily answered. First of all, the bilateral provisions and the ICAO Resolutions do discuss the subject of discrimination, but deal with this problem by requiring reciprocal exemptions from tax. Thus the fact that the Florida tax, after the decision by that state's Supreme Court, may not be facially discriminatory is not relevant.

Secondly, the symmetry that *Japan Line* and *Container Corporation* are addressing, is not limited to equality between the treatment in the United States of U.S. and non-U.S. companies. In *Japan Line*, the California property tax treated U.S. and Japanese cargo containers identically. The court nonethless had no trouble concluding that the tax creates an aysmmetry to Japan's disadvantage because of a practice of reciprocal exemption from tax similar to that at issue here. 441 U.S. at 453. Florida's argument simply does not address the issues in this case.

## CONCLUSION

The decision of the Florida Supreme Court should be reversed. In sustaining a state tax on fuel purchased by foreign air carriers for exclusive use in international commerce, the Florida Court has ignored the teachings of this Court in *Japan Line* and permitted the State of Florida to intrude into a well-settled area of exclusive federal jurisdiction. The simple fact is that the invalidation of the Florida tax in this case would permit the Federal Government to deal openly and unambiguously with the Canadian deviation from the international norm unhampered by the existence of state taxes at variance with a clear federal policy. On the other hand, the sustaining of the Florida tax would open the floodgates to other similar state taxes, to foreign retaliation, and to the crumbling of what has become the custom of nations with respect to this issue.

The threat of foreign retaliation and the undermining of a Federal Government policy painstakingly worked out with many nations over the past forty years are the clear



foreign policy implications of a decision upholding the Florida tax. The Federal Government has been at the forefront of developing the policy of reciprocal exemption from taxation of the instrumentalities of international aviation. If the states are allowed to impose taxes at variance with that policy, the policy itself becomes a mockery, and no other nation could agree to grant exemptions to the United States with any confidence that such exemptions would be fully reciprocated. Where a state law would have such an impact, it clearly implicates foreign policy issues that must be left to the Federal Government.

The fact that this case involves a country—indeed the only country—that does not follow the international consensus on reciprocal exemption makes it all the more essential that the Federal Government be left free to persuade that country to change its policy. Such efforts at persuasion would have little hope of success if the various states could tax what the Federal Government is urging other countries not to tax. In short this is a case where federal uniformity is essential and where state taxation is fatally inconsistent with the requirement of such uniformity.

Respectfully submitted,

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## APPENDIX

### BELGIUM

Air Transport Agreement, October 23, 1980, United States-Belgium, TIAS 9903, Article 9(5).

> Each party shall use its best efforts to secure for the designated airlines of the other Party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by State, regional and local authorities on the items specified in paragraphs (1) and (2) of this Article [fuel and other items], as well as from fuel through-put charges, in the circumstances described in this Article, except to the extent that the charges are based on the actual cost of providing the service.

### COSTA RICA

Agreement Concerning Air Transport, November 23, 1983, United States-Costa Rica, TIAS ——, Article 9(5).

> (5) Each Party shall use its best efforts to secure for the designated airlines of the other Party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by State, regional and local authorities on the items specified in paragraphs (1) and (2) of this Article [fuel and other items], as well as from fuel through-put charges, in the circumstances described in this Article, except to the extent that the charges are based on the actual cost of providing the service.

### ISRAEL

Protocol Between the United States of America and Israel Amending the Agreement of June 13, 1950, as Amended, August 16, 1978, United States-Israel, 29 UST 3144, TIAS 9002, Article 10.

> Each Party shall use its best efforts to secure for the designated airlines of the other Party on a reciprocal basis an exemption from taxes, charges and fees imposed by state, regional and local authorities on the aircraft and regular equipment of such airlines and on the items listed in paragraphs (b) and (c) of Article IV of the Agreement [fuel and other items], as well as from fuel through-put charges, in the circumstances described in those paragraphs, except to the extent that the charges are based on the actual cost of providing the service.



### JORDAN

Air Transport Agreement, June 8, 1980, United States-Jordan, TIAS 9868, Article 9(5).

> Each party shall use its best efforts to secure for the designated airlines of the other Party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by State, regional and local authorities on the items specified in paragraphs (1) and (2) of this Article [fuel and other items], as well as from fuel through-put charges, in the circumstances described in this Article, except to the extent that the charges are based on the actual cost of providing the service.

### UNITED KINGDOM

Agreement Concerning Air Services, July 23, 1977, United States-United Kingdom, 28 UST 5367, TIAS 8641, Article 8(5).

> (5) Each Contracting Party shall use its best efforts to secure for the designated airlines of the other Contracting Party on a reciprocal basis an exemption from taxes, charges and fees imposed by State, regional and local authorities on the items listed in paragraphs (1) and (2) of Article 9 (Customs Duties), as well as from fuel through-put charges, in the circumstances described under those paragraphs, except to the extent that the charges are based on the actual cost of providing the service.

(6)

No. 84-902

# In the Supreme Court of the United States

OCTOBER TERM, 1985

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WARDAIR CANADA INC., APPELLANT
v.
FLORIDA DEPARTMENT OF REVENUE

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## ON APPEAL FROM THE SUPREME COURT OF FLORIDA

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**BRIEF FOR**
AIR JAMAICA LIMITED, a foreign corporation;
AEROVIAS COLOMBIANAS LIMITADA, a foreign corporation;
CARIBBEAN AIR CARGO CO., LTD., a foreign corporation;
GUYANA AIRWAYS CORPORATION, a foreign corporation;
LINEAS AEREAS del CARIBE, S.A., a foreign corporation;
TACA INTERNATIONAL AIRLINES, S.A., a foreign corporation;
COMPANIA PERUANA de AVIACION "FAUCETT," S.A., a foreign corporation;
AERONAVES del PERU, S.A., a foreign corporation;
and
TRANSPORTES AEREOS MERCANTILES PANAMERICANOS, S.A., a foreign corporation
**AS AMICUS CURIAE.**

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## QUESTIONS PRESENTED

I. Whether Florida's tax on aviation fuel is at variance with federal policy because it violates the "one voice standard" by contradicting a clear federal directive and implicating foreign policy issues which must be left to the federal government.

A. A clear federal directive which evinces a uniform national rule prohibits individual states from taxing the sale of aviation fuel that is used by foreign instrumentalities exclusively in foreign commerce.

B. Florida's tax on aviation fuel implicates foreign policy issues which must be left to the federal government.

II. Whether the United States government is obligated to foreign nations to grant reciprocal tax exemptions for fuel purchased in the United States by foreign airlines domiciled in foreign countries pursuant to valid international bilateral agreements.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases:**



**Constitution:**



**Statutes and Regulations:**





**Treaties and International Agreements:**



**Other:**

**In the Supreme Court of the United States**

OCTOBER TERM, 1985

No. 84-902

WARDAIR CANADA INC., APPELLANT

v.

FLORIDA DEPARTMENT OF REVENUE

ON APPEAL FROM
THE SUPREME COURT OF FLORIDA

BRIEF FOR AIR JAMAICA LIMITED, et al.
AS AMICUS CURIAE

This brief is filed with written consent of Wardair Canada, Inc., Appellant and Florida Department of Revenue which consents have accompanied this brief.

## INTEREST OF AMICUS CURIAE

Amicus Curiae, hereinafter Amicus, is composed of a group of foreign air carriers established under the laws of foreign countries and having their principal place of business outside the United States. The nations in which they are domiciled are located in Central America (El Salvador), South America (Columbia, Guyana, and Peru), and the Caribbean (Jamaica and Barbados). Each Amicus has been found by the

Civil Aeronautics Board to be owned and effectively controlled by the government or nationals of its home country. Three of Amicus, Air Jamaica Ltd., Caribbean Air Cargo, Co., Ltd., and Guyana Airways Corp. are owned or substantially owned by their respective governments of domicile.

Each Amicus has been designated by its home government to provide international air transportation to and from the United States from various points outside of the United States. Aviation relations between the United States and each of Amicus' home governments is governed, inter alia, by a multilateral aviation agreement, Convention on International Civil Aviation T.I.A.S. No. 159, 61 Stat. 1180, et seq. All Amicus' home governments have entered into bilateral aviation service agreements with the United States. However, Peru's agreement expired on November 12, 1983. Negotiations for a new agreement has commenced.

Amicus have pending before this court its Jurisdictional Statement filed December 11, 1984 (Case No. 84-1041) having questions presented substantially the same as Appellant Wardair Canada, Inc.

## ARGUMENT

### I. FLORIDA'S TAX ON AVIATION FUEL IS AT VARIANCE WITH FEDERAL POLICY BECAUSE IT VIOLATES THE "ONE VOICE STANDARD" BY CONTRADICTING A CLEAR FEDERAL DIRECTIVE AND BY IMPLICATING FOREIGN POLICY ISSUES WHICH MUST BE LEFT TO THE FEDERAL GOVERNMENT.

Article I, Section 8, Clause 3, of the United States Constitution provides that Congress shall "regulate commerce with foreign nations and among the several states." The



commerce clause acts as a limitation upon a state's power to tax. Although interstate commerce is not immune from taxation, when the tax operates to regulate commerce between the states to an extent that interferes with the authority conferred on Congress the tax exceeds constitutional limits.

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), this Court set forth a four prong test under which local tax laws are scrutinized. A tax on interstate commerce cannot be sustained unless the tax: (1) Is applied to an activity with a substantial nexus with the taxing state; (2) Is fairly apportioned; (3) Does not discriminate against interstate commerce; and (4) Is fairly related to services provided by the state. *Complete Auto Transit*, 430 U.S. at 287. A state tax which impacts on interstate commerce and fails to withstand scrutiny under any of the four prongs stated in *Complete Auto Transit* is unconstitutional.[1]

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[1]Senate Bill 8A, fails to meet at least one of the four prongs of the *Complete Auto Transit* test. Senate Bill 8A creates a road-user tax on interstate commerce. If the legislature had enacted the tax on road users, this tax would sustain a challenge under the four prong test. However, the legislature created a road-user tax on air carriers who do not use the highway system in Florida.

Once the revenues are received from the tax in question, they are deposited into the Gas Tax Collection Trust Fund authorized by Fla. Stat. §206.45 (1983). After deduction and refunds for service charges, all but $2,800,000 annually is transferred to the State Transportation Trust Fund. The $2,800,000 is transferred to the Department of Natural Resources to be used for ". . .eradication of, control of, and research of water hyacinths and noxious aquatic vegetation." FLA. STAT. §212.69(3)(1983).

Based on the statutory accounts of the State Transportation Trust Fund found in Fla.Stat. §339.081(1983), the tax revenues accrue solely to the Division of Road Operations of the Department of Transportation. Monies accruing to the Division of Road Operations shall be restricted to the following purposes: construction of roads, maintenance of roads, preliminary engineering plans, compensation of certain employees of the Division of Road Operations and administrative expenses. FLA. STAT. §339.08 (1983). Thus, Senate Bill 8A fails to pass the fourth prong of

In addition to the four prong test stated in *Complete Auto Transit*, this Court has identified two additional concerns in foreign commerce cases: The risk of international multiple taxation between the various foreign governments and the United States; and the risk of state interference with uniform national foreign policy which prevents "the federal government from speaking with one voice when regulating commercial relations with foreign governments." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979) [hereinafter referred to as *Japan Line*].

Although the aviation fuel sales tax imposed by the state of Florida does not create the risk of international multiple taxation between the various foreign governments and the United States, the first prong of *Japan Line*, the tax interferes with uniform national foreign policy, thus violating the second prong of *Japan Line*.

In *Container Corporation of America v. Franchise Tax Board*, 103 S.Ct. 2933 (1983), this Court had occasion to apply the *Japan Line* extension of *Complete Auto Transit* to a corporate franchise tax geared to income imposed by the state of California on a corporation domiciled and headquartered in the United States. Although the issue presently before the court differs greatly in that here the Florida tax is imposed on aviation fuel used by companies domiciled and headquartered in foreign countries, *Container Corp.* does help to clarify the reach of the two prong *Japan Line* test concerning the foreign commerce clause.

This Court found in *Container Corp.* that the second prong of the *Japan Line* itself consists of a two part inquiry: "[A] state tax at variance with federal policy will violate the

*Complete Auto Transit* test because after tracing the flow of the tax revenues through the various statutory trust funds, no provisions are made for aviation related purposes. The fourth prong of the *Complete Auto Transit* test, requires that the tax be related to the services provided by the state. Here the services are for the use of roads and not airports.



"one voice" standard if it *either* implicates foreign policy issues which must be left to the federal government *or* violates a clear federal directive." *Container Corp.*, 103 S.Ct. at 2955 (emphasis in original).

The above language indicates clearly that a state tax is violative of the *Japan Line* "one voice" standard if either condition is present. In this case, both parts of the "one voice" standard are impinged upon by the State of Florida's 5.7 cents per gallon tax on aviation fuel used by foreign instrumentalities in foreign commerce. That is, this tax violates a clear federal directive, and further, it implicates foreign policy issues that must be left to the federal government.

### A. A Clear Federal Directive Which Evinces A Uniform National Rule Prohibits Individual States From Taxing The Sale Of Aviation Fuel That Is Used By Foreign Instrumentalities Exclusively In Foreign Commerce.

This Court in *Japan Line* was faced with the narrow issue "whether instrumentalities of commerce that are owned, based, and registered abroad, and that are used exclusively in international commerce, may be subjected to apportioned ad valorem property taxation by a state." *Japan Line*, 441 U.S. at 444. It is obvious that the issue presently before the court is almost identical. Florida has imposed a sales tax on aviation fuel sold to instrumentalities of commerce which are foreign owned, foreign based, and foreign registered. Furthermore, the aircraft at issue are used exclusively in international commerce. The only real difference between the two cases is that the tax in *Japan Line* was apportioned and the Florida tax is not.

In *Japan Line*, the Court found that the tax prevented the federal government from "speaking with one voice in regulating trade." 441 U.S. at 452. The Court discussed the

federal government's uniform treatment of containers used exclusively in foreign commerce and recognized the importance of the Customs Convention on Containers, which the United States and Japan had signed. *Id.* at 453. The Court stated that "[t]he convention reflects a national policy to remove impediments to the use of containers as 'instrumentalities of international traffic.'" *Id.* (citation omitted).

In the area of foreign air transportation, Congress, through treaties, bilateral agreements resulting from treaties, informal arrangements, and federal statutory provisions, has preempted state taxation of aviation fuel used exclusively by foreign instrumentalities solely in foreign commerce. The evidence that this Court found persuasive in *Japan Line* concerning a strong national policy in the treatment of containers embodied in the Container Convention, is much stronger in the present case. Reading together the actions of Congress and the executive branch in the area of regulating foreign air transportation leaves little doubt that the Florida tax violates a clear federal directive.

The federal government's uniform treatment of the taxing of aviation fuel used exclusively by foreign instrumentalities in foreign commerce is evidenced by the 1944 Chicago Convention of International Civil Aviation. Under this convention the United States and 156 other nations are committed to the implementation of various agreements and plans to improve international air transportation. Especially relevant to the issue presented is Article 24(a); "Fuel, lubricating oils, spare parts, regular equipment and aircraft stores on board an aircraft of a contracting state, on arrival in the territory of another contracting state and retained on board on leaving the territory of that state shall be exempt from customs duty, inspection fee or similar national or local duties or charges." (61 Stat. 1186). Although Article 24(a) is expressly limited to aviation and fuel supplies that are on board an aircraft upon its arrival and kept on the aircraft upon departure, the policy of reciprocal exemptions embodied in this section has had a far reaching effect in bringing about agreements



aimed at eliminating discriminatory treatment of foreign instrumentalities.

The main force in attempting to eliminate taxation on the sale or use of the instrumentalities of air travel has been the International Civil Aviation Organization (ICAO). The creation of ICAO at the Chicago Convention was the beginning of many years of research, negotiations, and policy making by the organization. In 1966, the ICAO Council adopted the following resolution:

> [F]uel, lubricants, and other consumable technical supplies taken on board [an aircraft] for consumption during [an international] flight shall be furnished exempt from all customs and other duties or, alternatively, any such duties levied shall be refunded. . . .

Almost all of the nations that participated in the Chicago Convention have implemented the above reciprocal agreement. Thus, these nations exempt aviation fuel purchased by foreign airlines from taxes, including sales, use, and excise taxes.

The United States, since the 1944 Chicago Convention, has signed bilateral aviation agreements with more than 70 foreign countries, including amicus. (For a full discussion of the import of these agreements, see *infra*, p. 15-22).

Congress has been very active in its regulation of foreign commerce, especially in the area of air transportation. The Court in *Container Corp.* failed to find congressional intent to preempt the tax area at issue. One of the reasons given by the Court was that there existed no federal tax statutes that provided preemptive force. *Container Corp.*, 103 S.Ct. at 2956. In the present case, there are several pieces of legislation which provide ample evidence that Congress has preempted the regulation of foreign air travel.

By treaty or other international agreement and by the terms of the permits issued them by the United Civil

Aeronautics Board (hereinafter Board), pursuant to 49 U.S.C. §1372, foreign carriers may only operate in foreign commerce. These operating permits prohibit the carriers from engaging in commerce solely within the nation's borders. The permits are also governed by the regulations found at 14 C.F.R. §375.42. Part (b)(2) of that section emphasizes that Congress intended the Board to "permit such operations only where conditions of reciprocity and the interest of the public in the United States are met."

The Federal Aviation Act of 1958, 49 U.S.C. §1301 et seq., is clearly a congressional enactment based on commerce clause powers, as is the International Air Transportation Fair Competitive Practices Act of 1974, 49 U.S.C. §1151 et seq., entirely based on foreign commerce powers of Congress. U.S. carriers engaged in reciprocal commerce with foreign nations "perform services of vital importance to the foreign commerce of the United States including its balance of payments, to the Postal Services, and to the national defense." 49 U.S.C. §1159b(a).

The federal government has completely preempted the regulation of the use of American airspace and the manner through which it may be passed. 49 U.S.C. §1348(a) and (c). Foreign air carriers are permitted, pursuant to the terms of 49 U.S.C. §1372, to utilize this national soverign airspace, 49 U.S.C. §1508(a). Such permits are subject to the Board's exclusive discretion regarding terms, conditions or limitations, 49 U.S.C. §1372(e), subject to their being consistent with relevant treaties, conventions and other foreign agreements, 49 U.S.C. §1502(a), and fulfilling the goals of United States International Air Transportation Policy as set forth in 49 U.S.C. §1502(b). An express element of this national foreign policy is elimination of operational and marketing restrictions. 49 U.S.C. §1502(b)(5).

Congress has thus exercised its constitutional power "to regulate commerce with foreign nations." Article 1, Section 8, Clause 3. It is a founding organic principle of this republic that:



> The words of the Constitution "comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend." *Gibbons v. Ogden*, 9 Wheat. 1, 193, 6 L.Ed. 23. It is an essential attribute of the power that it is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified, or impeded to any extent by state action.
>
> * * *
>
> The principle of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce.

*Board of Trustees of University of Illinois v. United States*, 289 U.S. 48, 56-5, 53 S.Ct. 509, 510 (1933).

Congress, by exercising its exclusive plenary power and vesting certain discretion in the executive branch, has extensively regulated and occupied this nations dealings with foreign air carrier commerce. The foreign airlines and their nations' governments deal with one federal government, not 50 state governments. As far as foreign air commerce is concerned, there are no states. Federally designated cities, not states are ports of entry into this nation and are designated without seeking state consent. 49 U.S.C. §1509(b). In reality there is no real question of preemption because there is nothing to preempt; the Constitution mandates that this field belongs exclusively to the federal government.

There is no Florida airspace. The airspace over Florida is under the exclusive soverign control of the federal government. 49 U.S.C. §1508(a).

While states may impose reasonable burdens on domestic interstate commerce, they are prohibited completely from

burdening foreign commerce. The operations of foreign air carriers, in their absolute entirety, are matters of foreign commerce. Congress has no lawful ability to share its constitutionally exclusive power regulating foreign commerce with the states, unlike the permissible sharing of power regarding interstate commerce.

This Court has recognized that a state tax may have foreign policy implications other than the threat of retaliation. *Container Corp.* 103 S. Ct.at 2956. Although not dispositive, this Court noted in *Container Corp.* that the executive branch had decided not to file an *Amicus Curiae* Brief opposing the states taxes. *Id.* at 2956. Submission of a brief by the executive branch evidences the impact the state's action at issue has in the area of foreign affairs. Here, a brief for the United States as amicus curiae was filed by the Solicitor General which has expressed views of the executive branch of the United States. The Solicitor General illustrates the pervasive federal regulation in this area:

> This nation's aviation relations with foreign governments are implemented through a comprehensive network of treaties, bilateral executive agreements, informal arrangements, and federal statutory provisions. *The pattern produced by these varied strands, a pattern to which the federal government has long been committed, is one of reciprocal tax exemptions for aircraft, equipment and supplies, including aviation fuel, that constitute the instrumentalities of international air traffic. (e.s.)* Due in part to our nation's advocacy, this pattern has become the accepted international norm in the aviation field, a concensus that reflects the longstanding custom of nations in international maritime trade.

Brief for the United States of Amicus Curiae, September 1985 at 10.



Clearly, the position of the executive branch of the United States is that aviation fuel constitutes instrumentalities of international aviation and is tax exempt based on reciprocity. Thus, the position of the United States has been made available to this Court, unlike the case of *Container Corp.* Also, unlike *Container Corp.*, but as in *Japan Line*, the executive branch is opposed to the tax as applied to appellant and amicus herein because of the far reaching, detrimental ramifications of this kind of tax on foreign relations and foreign trade policy.

In addition, the executive branch has expressed its disapproval of Florida's tax as applied to the foreign air carriers through correspondence with the State Department to Florida. In 1982 the State Department wrote to the taxing officials in Florida expressing concern that Florida was considering a tax on aviation fuel. After the enactment of the aviation fuel tax, the State Department, somewhat surprised and distressed, again wrote the taxing officials of Florida, questioning Florida's decision to enact this tax without an exemption based on reciprocity. The State Department stressed that failure to exempt the foreign air carriers would no doubt result in serious foreign relations problems. (*See* Brief for the United States as Amicus Curiae, September 1985 at 20, 21).

Congress, by ratifying the 1944 Chicago Convention and by passing legislation involving the Civil Aeronautics Board has demonstrated clearly its intent to preempt state action in the area of foreign air transportation. Federal preemption is further evidenced by the action and the interest of the executive branch in this area. In general, the executive branch has entered into various treaties and international agreements concerning foreign air travel. More specifically, the State Department attempted to point out to Florida its error in not exempting foreign airlines from the tax, illustrating the executive branch's interest in this area. Finally, the Solicitor General filed a brief on behalf of the United States to emphasize the negative impact of Florida's tax in the area of

foreign relations. This Court, based on the federal government's preemption of the regulation of foreign air transportation, should find that Florida's tax on the sale of aviation fuel used exclusively by foreign instrumentalities in foreign commerce violates the foreign commerce clause. This court stressed the urgency of federal uniformity in *Japan Line*:

> [A] state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential. Foreign commerce is preeminently a matter of national concern. In international relations with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.

*Japan Line*, 441 U.S. at 450 (citations and quotation marks omitted). Florida's taxation of aviation fuel sold to foreign instrumentalities runs directly counter to our government's uniform treatment of foreign air transportation.

In the event this Court is not convinced that the federal government has preempted this area, amicus submits that Florida is violating the "one voice" doctrine of *Japan Line* by implicating foreign policy issues and is inviting retaliation by foreign countries that will have a negative effect on our country's foreign trade.

### B. Florida's Tax On Aviation Fuel Implicates Foreign Policy Issues Which Must Be Left To The Federal Government.

This Court in *Container Corp.* stated a "state tax at variance with the federal policy will violate the 'one voice' standard if it . . . implicates foreign policy issues which must be left to the federal government." *Id.* at 2955. Retaliation



against this nation as a whole, caused by a state tax which offends our foreign trading partners, is the most obvious foreign policy implication. *Id.* at 2955.

In *Japan Line* this court explained how a state tax may frustrate the achievement of federal uniformity:

> A state tax on instrumentalities of foreign commerce may frustrate the achievement of federal uniformity in several ways. If the State imposes an apportioned tax, international disputes over reconciling apportionment formulae may arise. If a novel state tax creates an asymmetry in the international tax structure, foreign nations disadvantaged by the levy may retaliate against American-owned instrumentalities present in their jurisdictions. Such retaliation of necessity would be directed at American transportation equipment in general not just that of the taxing state, so that the nation as a whole would suffer. (footnotes omitted).

*Id.* at 1822.

The risk of retaliation by Jamaica and other foreign countries is real as evidenced by the several diplomatic messages already before this court. If Florida is allowed to tax the instrumentalities of foreign commerce, then our foreign trading partners will retaliate by taxing American owned instrumentalities present in that foreign jurisdication. The risk of retaliation is acute and will be felt by the nation as a whole. If Florida is allowed to fire the first shot in an international tax war, other forms of domestic transportation will be subjected to retaliatory taxation. As in *Japan Line*, "[Florida] by its unilateral act, cannot be permitted to place these impediments before this nation's conduct of its foreign relations and its foreign trade." *Id.* at 1824. Likewise, Florida may not tell this

nation or its foreign trading partners how to conduct foreign policy decisions.

In *Container Corp.*, the Court distinguished that case from *Japan Line* on three different points. A short discussion will show clearly that the present case, unlike *Container Corp.*, is virtually identical to *Japan Line*.

First, the Court noted that the corporation franchise tax at issue did not create automatic asymmetry. *Id.* at 2955. The Court in *Japan Line* made clear exactly what asymmetry means: "It is stipulated that American-owned containers are not taxed in Japan. California's tax thus creates an asymmetry in international maritime taxation operating to Japan's disadvantage." *Japan Line*, 441 U.S. at 453. (citation omitted). Presently, the amicus' countries do not tax aviation fuel sold to U.S. aircraft. Therefore, Florida's taxing of fuel sold to amicus works to the disadvantage of amicus' countries, creating an asymmetry found intolerable in *Japan Line*.

Second, the Court found that the California tax at issue in *Container Corp.* was imposed on a domestic entity and "not on a foreign entity as was the case in *Japan Line*." *Container Corp.*, 103 S.Ct. 2955. Clearly, the tax imposed by Florida, as in *Japan Line*, is imposed on foreign entities engaged exclusively in foreign commerce. The legal incidence of Florida's tax falls exclusively on foreign owned instrumentalities of foreign commerce. As pointed out in the brief for the United States as amicus curiae (September 1985), not only are the foreign airlines owned by foreign entities, but about half of the appellant airlines are wholly owned or substantially owned by foreign national governments (brief for the United States as amicus curiae, September 1985, at 2). Thus, Florida's tax is an indirect tax on foreign governments to the extent of ownership of the foreign airlines by foreign governments. Because the tax is an indirect tax on foreign governments, the risk of retaliation is greater than in *Japan Line* which involved a tax on a foreign non-governmental entity.

The third factor was foreign nations that may have a



legitimate interest in reducing the tax burdens of domestic corporations. In the instant case, as was in *Japan Line*, the tax is on foreign entities exclusively.

Although the above analysis of retaliation in *Container Corp.* dealt only with taxes, the risk of other forms of retaliation exists. The United States Solicitor General expressed in a footnote of his brief (September 1985, pg. 34, note 33) the specific types of retaliation. This point is more specifically addressed in amicus point II of this brief.

Clearly the tax imposed by Florida implicates foreign policy issues by creating a substantial risk of asymmetry in the tax structure of foreign commerce and taxing foreign entities engaged exclusively in foreign commerce, areas which must be left to our federal government.

Should this court disagree that Florida's tax violates the "one voice" doctrine announced in *Japan Line*, then an exemption should be granted based on reciprocity pursuant to valid international agreements.

## II. THE UNITED STATES GOVERNMENT IS OBLIGATED TO FOREIGN NATIONS TO GRANT RECIPROCAL TAX EXEMPTIONS FOR FUEL PURCHASED IN THE UNITED STATES BY FOREIGN AIRLINES DOMICILED IN FOREIGN COUNTRIES PURSUANT TO VALID INTERNATIONAL BILATERAL AGREEMENTS.

Amicus curiae in this case enjoys certain privileges and immunities when conducting air transportation into the United States pursuant to valid air transport service agreements with the United States and their respective sovereign governments.

All international agreements relied on by amicus contain language similar to that found in the Jamaican-United States Air Transport Service Agreement (T.I.A.S. No. 6770) which states in Article 8 as follows:

A. Each contracting party shall exempt the designated airline or airlines of the other contracting party to the fullest extent possible under its national law, on the basis of reciprocity, from import restrictions, customs, duties, excise taxes, inspection fees, and other national duties and charges on fuel, lubricants, consumable technical supplies, spare parts including engines, regular equipment, ground equipment, stores, and other items intended for use solely in connection with the operation of servicing of aircraft of the airlines of such other contracting parties engaged in international air service. The exemptions provided under this paragraph shall apply to items:

* * *

(3) Taken on board aircraft of the designated airlines of one contracting party in the territory of the other and intended for use in international service; whether or not such items are used or consumed wholly within the territory of the contracting party granting the exemption.

Further, the Jamaican-United States Protocol, Article 10 (T.I.A.S. No. 9613); Salvador-U.S. Agreement Article 9(5) (T.I.A.S. No. 10488); and Barbados-United States Agreement, Article 9(5) (T.I.A.S. No. 10370) contain similar language as follows:

(6) Each party shall use its best efforts to secure for the designated airlines of the other party, on the basis of reciprocity, an exemption from taxes, duties, charges, and fees imposed by state, regional and local authorities specified in paragraph (a) of



Article 8 of the Agreement of this article, as well as from fuel through put charges, in the circumstances described in Article 8 of the Agreement, except to the extent that the charges are based on the actual cost of providing the service.

Jamaican-U.S. Protocol, Article 10, T.I.A.S. 9613.

The reference in the above paragraph referring to paragraph (a) relates back to "each contracting party shall exempt. . .airlines of the other contracting party. . .under its national law. . .from excise taxes on fuel." Jamaican-U.S. Agreement, Article 8, T.I.A.S. 6770.

There are some international agreements of amicus that do not contain the specific language referenced above (Jamaican-U.S. Protocol). However, the agreements that do not contain this specific language have similar and saving language. A representative example is the Air Transport Service Agreement between the United Kingdom and the United States (Guyana Airways) states:

Fuel, lubricating oils and spare parts introduced into, or taken on board aircraft in, the territory of one contracting party by, or on behalf of, a designated air carrier of the other contracting party and intended solely for use by the aircraft of such carrier shall be accorded, with respects to customs, duties, inspection fees or other charges imposed by the former contracting party, treatment *not less favorable than that granted to national air carriers engaged in international air services or such carriers of the most favored nation.* (e.s.).

U.K.-U.S. Agreement Article 3(2), T.I.A.S. No. 1507.

This above stated "most favorable nation clause" gives equal dignity to the remaining amicus concerning the exemp

tion of fuel to those carriers which have specific statements of reciprocal exemption from state taxes. The logical conclusion is that these foreign nations would be granted treatment no less favorable than the most favored nation when dealing with the subject of aviation fuel taxation.

By virtue of these international agreements and pursuant to the authority of the Civil Aeronautics Board, amicus are permitted to fly routes between foreign origins into specified cities (airports) in the United States. Amicus are not permitted to engage in intrastate or interstate flights within the United States and by virtue thereof never depart from foreign commerce. (See 49 U.S.C. App. 1508(6)). Many foreign governments which conduct trade and transportation relations with the United States do not have complex forms of government made up of 50 state constitutions and state laws; and one national constitution and federal laws. When foreign relations are conducted with the United States they are conducted with one national entity—the United States government. Due to the United States infrastructure of internal governments, a balance of federal versus states rights must be had and adhered to.

This Court in its opinion in *United States v. Belmont*, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134 (1937), aptly described the balance of federal versus state responsibilities in the context of international agreements.

> Government power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the executive had authority to speak as the sole organ of that government. The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty making clause of the Constitution



(Article 2, Section 2), require the advice and consent of Senate.

*Id.* at 330.

> We held (in *Altman*, 224 U.S. 583) that although this might not be a treaty requiring ratification by the Senate, it was a compact negotiated and proclaimed under the authority of the President, and as such was a treaty within the meaning of the Circuit Court of Appeals Act (26 Stat. 826), the construction of which might be reviewed upon direct appeal to this court.

*Id.* at 331. The Court continued:

> In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purpose the state of New York does not exist. Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, state constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power. (citations omitted).

*Id.* at 331-2.

The United States, throughout its history, has had to continuously face a test of credibility. That test is even more acute in this present day world of mass media and rapid transportation. Amicus would request this court to take judicial notice of the sensitive international political environment existing in the geographic location of amicus. The

current political tensions existing in Central America and the recent vintage conflict in Granada are common knowledge and reflect our government's need to handle all matters involving this area of the world with extreme care.

This test of credibility is not a matter of speculation in the present case. The United States has received diplomatic notes from 26 foreign countries[2] protesting state taxation of aviation fuel. Several of these diplomatic notes (including Amicus Government of Columbia) reference a retaliatory tax.

The issue of credibility is the heart of the international agreements between the United States and the governments of amicus. In order for the United States government to effectively operate in its exclusive domain of foreign relations, the international agreements entered into must be honored.

The United States' failure to adhere to the international agreements permitting a state tax on aviation fuel on an instrumentality of foreign commerce would cause the nation as a whole to suffer.

The United States Solicitor General aptly pointed out in his brief (September 1985, pg. 34) that "provoking the threat of foreign retaliation. . .would jeopardize the reciprocal exemption policy." The retaliatory conduct threat is substantial. In footnote 33 (September 1985 brief, pg. 34) he states:

> They (foreign governments) can levy artifically inflated "user fees," impose obstacles to repatriation of foreign earnings, route airlines to less desirable airports; refuse to let carriers use baggage handlers of choice; give local airlines preference in carrying air cargo; restrict United States airlines' local advertising; or impose excessively complicated

[2]In the Appendix of the Brief for the United States as Amicus Curiae (Case Nos. 84-902, 84-922, and 84-1041, September 1985, are 25 diplomatic notes (Appla-85a); and in Amicus Juridsictional Statement Appendix is a Jamaican diplomatic note (MFA Note No. 558/5055).



> customs procedures or other delays and inconveniences. See U.S. Civil Aeronautics Board, FT 1967 Report to Congress 103-108 (1977).

Clearly there is no limitation on retaliation. It foreseeably could reach all modes of transportation and all areas of trade.

Although the United States Solicitor General states that reciprocal exemptions are a matter of strong federal policy, amicus would suggest that these reciprocal international agreements are a matter of supremacy over state law and have equal dignity with federal law.

The American Law Institute clearly recognizes the status of international agreements between the United States and foreign states in its most recent draft of its foreign relations restatement wherein it states:

> International law and international agreements of the United States are law of the United States and supreme law over the law of the several states of the United States.

Restatement of the Law, Foreign Relations Law of the United States (revised), Tentative Draft No. 6, Vol. 1, §131 (April 12, 1985).

The genesis of the individual aviation service agreements of amicus was the Chicago Convention, an International Civil Aviation, executed by the United States on December 7, 1944, and ratified and approved by the United States Senate on August 9, 1946 (T.I.A.S. 159).

All of amicus are signatories of the Chicago Convention. This convention binds the United States and the government of amicus to implement various measures to facilitate air transportation between them. The ultimate product of this commitment is binding international air transportation service agreements. Each government, through these international agreements, is bound to grant reciprocal tax exemptions on

aviation fuel used in foreign commerce. There is no need for legislative enactment. The United States government has the responsibility to determine whether or not contracting nations grant fuel tax exemption to the United States carriers and must grant reciprocal right to other foreign government air carriers who do grant such exemption.

A rule of international law derives its status of law in the United States from its character as an international legal obligation of the United States. These reciprocal international agreements, if not "federal law," are binding and as such prohibit the state of Florida from taxing aviation fuel that propels the instrumentalities of foreign air commerce.



## CONCLUSION

For these reasons, the court should declare Florida's aviation fuel sales tax unconstitutional as applied to Appellant and Amicus foreign airlines.

Respectfully submitted,

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## PROOF OF SERVICE

I, THOMAS W. LAGER, depose and say that I am attorney of record for Amicus, AIR JAMAICA LIMITED; AEROVIAS COLOMBIANAS LIMITADA; CARIBBEAN AIR CARGO CO., LTD.; GUYANA AIRWAYS CORPORATION; LINEAS AEREAS del CARIBE, S.A.; TACA INTERNATIONAL AIRLINES, S.A.; COMPANIA PERUANA de AVIACION "FAUCETT," S.A.; AERONAVES del PERU, S.A.; TRANSPORTES AEREOS MERCANTILES PANAMERICANOS, S.A., and that on December 18, 1985, I served a copy of the foregoing Brief of Amicus Curiae on each of the parties required to be served herein, as follows:

On Appellee, STATE OF FLORIDA, DEPARTMENT OF REVENUE, by mailing copies in duly addressed envelopes, with first class postage prepaid, to WILLIAM D. TOWNSEND, General Counsel, State of Florida, Department of Revenue, Room 203, Carlton Building, Tallahassee, Florida 32301; JOSEPH C. MELLICHAMP, III, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301; and to WALTER HANSEN, Esquire, Burwell, Hansen, Manley & Peters, 1762 Church Street, N.W., Washington, D.C. 20036.

All parties required to be served have been served.

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(8)

No. 84-902

# In the Supreme Court of the United States

OCTOBER TERM, 1985

---

WARDAIR CANADA INC., APPELLANT

*v.*

FLORIDA DEPARTMENT OF REVENUE

---

*ON APPEAL FROM THE SUPREME COURT OF FLORIDA*

---

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANT

---

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17

## QUESTION PRESENTED

Whether a Florida sales tax on aviation fuel, as applied to fuel purchased by foreign airlines for use exclusively in international traffic, unconstitutionally impairs the power of the federal government to regulate foreign commerce.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

# In the Supreme Court of the United States

OCTOBER TERM, 1985

---

No. 84-902

WARDAIR CANADA INC., APPELLANT

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*ON APPEAL FROM THE SUPREME COURT OF FLORIDA*

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANT**

---

## INTEREST OF THE UNITED STATES

The federal government has exclusive responsibility for the conduct of commercial relations with foreign governments, including the implementation of this Nation's international aviation policy. Congress has directed "[t]he Secretary of State [to] advise the Secretary of Transportation * * * concerning the negotiations of any agreement with foreign governments for the establishment or development of air navigation, including air routes and services" (49 U.S.C. App. 1462). "In formulating United States international air transportation policy," Congress has provided that the Secretary of State, in consultation with the Secretary of Transportation, "shall de-

velop a negotiating policy which emphasizes the greatest degree of competition that is compatible with a well-functioning international air transportation system" (49 U.S.C. App. 1502(b)).

The United States has a substantial interest in ensuring that state laws do not interfere with the accomplishment of federal objectives in the field of international aviation. The Florida tax at issue here, if sustained as applied to aviation fuel used by foreign airlines exclusively in foreign commerce, will impair federal aviation policy and complicate, if not undermine, the federal government's efforts in international negotiations. At this Court's invitation, the United States previously filed a brief urging that probable jurisdiction be noted in this case.

## ARGUMENT

1. In *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 449 (1979), this Court held that the Commerce Clause commits to the exclusive authority of the federal government the regulation of those aspects of foreign commerce which by their very nature "necessitate a uniform national rule." In the brief that we previously filed, we explained why we believe that the imposition of levies and charges on airplane equipment and supplies, including aviation fuel, used by foreign airlines exclusively in international traffic, is an aspect of foreign commerce that shares this nature. The United States has long believed that our foreign commerce is best served by the elimination, to the greatest extent possible, of obstacles to the free flow of international aviation. To that end, the United States has consistently advocated a policy under which the instrumentalities of international air transport are granted, on the basis of reciprocity, a complete exemption from taxes levied by any jurisdiction outside the carrier's own country.



Due in part to our Nation's advocacy, the policy of reciprocal tax exemptions has become the accepted international norm in the aviation field, a pattern that reflects the longstanding custom of nations in international maritime trade. This consensus is evident in the Chicago Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, 61 Stat. 1180 *et seq.*, in Resolutions adopted pursuant to that Convention by the International Civil Aviation Organization (ICAO), and in our bilateral executive agreements. Virtually all 157 nations party to the Chicago Convention have substantially implemented the ICAO Resolutions, and, accordingly, grant aviation fuel purchased by foreign airlines for use in international traffic a complete exemption from taxes, including sales, use, and excise taxes, levied either by national governments or by their political subdivisions. See U.S. Br. 10-22.

This Court noted in *Japan Line* that "a state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential" (441 U.S. at 448), and held that such a tax is invalid if it "prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments'" (*id.* at 451, quoting *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 285 (1976)). In the brief that we previously filed (U.S. Br. 22-35), we explained in detail our reasons for concluding that Florida's sales tax on aviation fuel, as applied to fuel purchased by foreign airlines for use exclusively in foreign commerce, is inconsistent with strongly-articulated federal policy and with accepted international practice, and hence is unconstitutional under the Commerce

Clause as construed in *Japan Line*. We have little to add to the discussion set forth in that brief insofar as the application of Florida's tax to the appellants in *Lineas Aereas Costarricenses* v. *Florida Department of Revenue*, No. 84-922, and *Air Jamaica Limited* v. *Florida Department of Revenue*, No. 84-1041, is concerned. Those cases are being held pending disposition of the instant appeal.

The instant appellant, unlike the appellants in the other two cases, is domiciled in Canada. As we noted in our earlier brief (at 13), Canada appears to be the sole possible exception to the international norm of reciprocal tax exemptions described above. While United States airlines, through bilateral executive agreement,[1] are exempt from taxes imposed by the Canadian national authorities on fuel purchased in Canada, Canada's provincial governments also "impose taxes on aviation fuel and, like Florida, [they] generally do not grant an exemption for fuel purchased by foreign airlines for use in foreign commerce" (U.S. Br. 13). This case accordingly raises the question whether the appellant here, by reason of Canada's domestic taxing practices, is "situated differently from the other appellants" (*id.* at 35). We believe that it is not.

2. Ten Canadian provincial governments currently impose taxes on the sale of aviation fuel.[2] In their

[1] See Nonscheduled Air Service Agreement, May 8, 1974, United States-Canada, art. XII(1), 25 U.S.T. 794, *reprinted at* 84-902 J.S. App. A58; Air Transport Services Agreement, Jan. 17, 1966, United States-Canada, art. XI, 17 U.S.T. 201, 205.

[2] The statistical information set forth in the succeeding paragraphs was provided to us by the Canadian Embassy, or was compiled at our request by the U.S. Department of Energy, based on data furnished to it by Canadian authorities.



structure and incidence, these taxes are similar to the challenged Florida tax. As in effect in April 1983, when Florida enacted its levy, the tax rates varied considerably from province to province, ranging from a low of $0.007 (Canadian) per liter (*e.g.*, in Newfoundland and Prince Edward Island), to a high of $0.050 (Canadian) per liter (in British Columbia). Expressed in U.S. dollars per gallon at current exchange rates,[3] the Newfoundland tax in 1983 was about 1.9 cents a gallon, and the British Columbia tax was about 13.55 cents a gallon, representing approximately 2% and 15% respectively of the total purchase price paid by a United States carrier. Generally speaking, Canadian provincial tax rates on aviation fuel were higher in the country's western, energy-producing provinces than in its Atlantic seaboard provinces. Two provinces—Quebec and Alberta—exempted foreign airlines from tax in 1983, and those exemptions continue to the present day. The other eight provinces continue to tax aviation fuel purchased by foreign airlines, although the tax rates have changed somewhat since 1983.

Before this litigation began, the State Department had not had occasion to approach Canadian authorities formally concerning the provincial fuel taxes described above. In many instances, protests by federal aviation officials to foreign governments are prompted by complaints from United States carriers. Although the Canadian provinces have levied sales taxes on aviation fuel for a number of years, United States carriers had not previously lodged formal complaints with United States officials about that

[3] See Wall St. J., Dec. 19, 1985, at 34, col. 2.

practice.[4] In view of the absence of formal complaints, as well as the questions that the Government of Canada (pointing to actions like Florida's here) could have been expected to raise concerning the ability of the United States itself to guarantee full reciprocity at the local level, the federal government did not believe itself in a position to pursue relief vigorously from the Canadian provincial taxes.

Following the commencement of this lawsuit, however, federal officials have notified the Canadian Government of the United States' concern as to whether the Canadian provincial taxes constitute a failure of reciprocity and of the United States' intention to pursue this issue. The Department of Transportation has conferred with United States carriers, through the medium of the Air Transport Association, about the implications of this case. The Department has been informed that the domestic airlines fully support a diplomatic initiative with Canada.

3. In our view, the existence of the Canadian provincial taxes described above makes no difference to the assessment of the constitutionality of Florida's tax as applied to the Canadian appellant. If Florida's tax violates the Commerce Clause, as we believe it does, it is because "the taxation of foreign-owned [instrumentalities of air commerce] is an area where a uniform federal rule is essential" (*Japan Line*,

[4] The reasons for this absence of complaint are not entirely clear. Several of the principal Canadian destinations for U.S. carriers (such as Montreal, Calgary, and Edmonton) lie in the two provinces (Quebec and Alberta) that exempt foreign carriers from fuel tax. Toronto, probably the chief destination, lies in Ontario, which imposes a fuel tax, but whose refinery price for jet fuel (between April 1983 and January 1984, the most recent period for which figures are available) was almost invariably lower than that prevailing elsewhere in Canada.



441 U.S. at 455). The "uniform federal rule" involved here is the United States' longstanding policy of granting foreign airlines, and of encouraging other countries to grant our airlines, exemption from all applicable taxes on the basis of reciprocity. It is the federal *policy*, not the particular taxing practice of a particular foreign state, on which the validity of Florida's tax depends.

This Court held in *Japan Line* (441 U.S at 453) that "[a state], by its unilateral act, cannot be permitted to place * * * impediments before this Nation's conduct of its foreign relations and its foreign trade." By undertaking to tax aviation fuel purchased by a foreign airline for use in foreign commerce, a state impedes the United States' international aviation policy regardless of the actual taxing practice of the foreign airline's domicile. If the foreign domicile grants reciprocity, the state's action will invite retaliatory taxation, or other retaliatory measures, against United States carriers abroad, retaliation that "of necessity would be felt by the Nation as a whole" (*ibid.* (footnote omitted)). If the foreign domicile does not grant reciprocity, the state's action would undercut the United States' position in negotiations designed to rectify that problem, since the United States would then be disabled from offering the foreign government true reciprocity in return. In either event, the state's action would frustrate the federal objectives of maintaining and extending the practice of reciprocal tax exemptions in the field of international aviation.

The Canadian provincial taxes to which we have referred may cause international difficulties. Any problems they create, however, "are problems that admit only of a federal remedy [and] do not admit of a

unilateral solution by a State" (*Japan Line*, 441 U.S. at 457). If those taxes are said to breach reciprocity, it is the federal government, not the individual states, that must make the appropriate inquiry. And if those taxes are determined to breach reciprocity, it is the federal government, not the individual states, that is alone capable of taking the diplomatic steps (including the adoption of any appropriate sanctions) necessary to effect a resolution.[5]

4. In its motion to dismiss (Mot. to Dis. 13-14, 29-30), Florida has argued that the effect of our position, in the case of appellants generally, is to discriminate in favor of foreign airlines and against domestic airlines that compete with them on the same routes. The Florida Supreme Court has sustained the constitutionality of Florida's tax as applied to

[5] Any other conclusion would produce an extremely awkward result, both from a doctrinal and a practical point of view. It would be conceptually odd if the Commerce Clause made the constitutionality of a state tax hinge on the individual taxing practice of a particular foreign country. Practically speaking, moreover, the states are very poorly situated to determine whether a foreign nation (or one of its political subdivisions) has committed a breach of reciprocity sufficient to justify the state's imposition of a tax. Particularly is this so since the internationally-favored reciprocal exemption policy covers not only aviation fuel, but a long list of aviation equipment, lubricants, and supplies (including such items as food and alcoholic beverages) incidental to transnational flights. And even if a state were capable of tracking the performance of the 156 foreign signatories to the Chicago Convention on these matters, it would clearly be in no position to decide what mode and degree of "retaliation" might be desirable or correct. Of course, should efforts of the executive branch ultimately prove unsuccessful in resolving the problem, Congress under the Commerce Clause could authorize the imposition of appropriately responsive taxation by the states.



fuel purchased by domestic airlines, and the domestic carriers' appeals were dismissed by this Court. *E.g.*, *Eastern Airlines, Inc.* v. *Florida Department of Revenue*, 455 So. 2d 311 (1984), appeal dismissed, No. 84-926 (Oct. 15, 1985).[6] In view of that decision, Florida contends, our position in effect "destroys competitive equality" between domestic and foreign carriers by requiring Florida to grant the latter a tax subsidy that their domestic competitors do not enjoy (Mot. to Dis. 13).

This assertion is incorrect. The construction of the Foreign Commerce Clause that we urge does indeed grant foreign airlines a "tax holiday" in the United States with respect to certain items—aviation fuel, equipment, and supplies—on which their domestic competitors may have to pay tax. In view of the almost universal acceptance of the reciprocal exemption policy, however, United States airlines will have a tax holiday *abroad* with respect to those same items, items on which any applicable taxes will have to be paid by foreign competitors domiciled in those nations. Because of the symmetrical nature of the reciprocal exemption policy, in other words, there is no discrimination between domestic and foreign carriers when the situation is viewed, as it must be viewed, from a worldwide rather than from a water's-edge perspective.

More generally, United States carriers do business abroad at the suffrance of their host governments, and they depend to a large degree on those govern-

[6] Although the domestic airlines involved in those appeals engaged in foreign as well as interstate commerce, they did not argue that Florida's tax as applied to them violated the Foreign Commerce Clause. See 84-921, 84-926 & 84-929 U.S. Br. 7 n.2.

ments' goodwill. Because foreign nations correctly regard Florida's tax on aviation fuel as a failure of reciprocity, and because they have evidenced by their diplomatic notes (see U.S. Br. 21-22) serious concern about Florida's action, those governments can be expected to take retaliatory measures against United States carriers if Florida's tax is sustained. Besides imposing taxes at the national or local level, foreign nations could retaliate by discriminating against United States airlines in various ways. In the past, United States carriers have encountered a variety of discriminatory measures abroad, including the levy of artificially-inflated "user fees," the imposition of obstacles to repatriation of foreign earnings, the routing of airlines to less desirable airports, the refusal to let carriers use baggage handlers of choice, the award to local airlines of preference in carrying air cargo, the imposition of restrictions on United States airlines' local advertising, and the infliction of excessively complicated customs procedures and bureaucratic red tape. See U.S. Civil Aeronautics Board, *FY 1976 Report to Congress* 103-108 (1977).

For most United States airlines, the competitive disadvantage they risk suffering abroad if Florida's tax is sustained dwarfs any disadvantage they suffer here by virtue of foreign airlines' enjoyment of a state tax exemption that domestic carriers do not share. As noted in our earlier brief (at 16-17), this Nation's recent bilateral aviation agreements obligate the United States to use its best efforts to secure for foreign airlines an exemption from state and local taxes on aviation fuel and supplies; these agreements were developed and negotiated with the concurrence of United States carriers. Domestic carriers have expressed no opposition to the position that we have



taken in this case. Indeed, American Airlines, a United States carrier with extensive international operations, has joined in a brief amicus curiae urging that the decision below be reversed. See Brief of Amicus Curiae Aer Lingus et al., No. 84-902.[7]

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[7] Even if the construction that we urge were thought to produce some kind of net discrimination in favor of foreign airlines, that fact would not be dispositive of the Commerce Clause outcome. The effect of this Court's decision in *Japan Line* was to grant foreign-owned shipping containers an exemption from state property taxes that domestically-owned shipping containers did not enjoy. But the Court explicitly rejected California's "policy argument[]" that "by exempting [the Japanese] containers from tax, the State in effect will be forced to discriminate against domestic, in favor of foreign, commerce" (441 U.S. at 456, 457). Even if Florida's argument concerning alleged "discrimination" were correct, therefore, it would have no greater weight here in assessing the constitutionality of the challenged tax than California's virtually identical argument had in *Japan Line*. Of course, if domestic carriers believed themselves disadvantaged by the constitutional outcome which, in the absence of congressional legislation, we submit to be proper under the Foreign Commerce Clause, they could seek appropriate relief from Congress. When such "policy arguments" are directed to this Court, however, they "are directed to the wrong forum" (*Japan Line*, 441 U.S. at 456, 457).

## CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted.

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No. 84-902



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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WARDAIR CANADA, INC.,
*Appellant,*

v.

FLORIDA DEPARTMENT OF REVENUE,
*Appellee.*

---

**On Appeal from the Supreme Court of Florida**

---

**MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF APPELLEE**

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## QUESTIONS PRESENTED

1. Whether a state excise tax on aviation fuel purchased by foreign airlines is preempted by federal law.

2. Whether a state tax that has not been affirmatively preempted by Congress or the Executive Branch, and is also non-discriminatory, fairly apportioned, and not likely to result in multiple taxation, should be invalidated on the ground that it prevents the federal government from speaking "with one voice" regarding foreign commerce.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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No. 84-902

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Pursuant to Rule 36 of the Rules of this Court, *amici* respectfully move this Court for leave to file the attached brief *amicus curiae* in support of appellee.*

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* Appellee has consented to the filing of this brief. Appellant has not.

The *amici*, organizations whose members include state, county, and municipal governments and their officials throughout the United States, have a vital interest in legal issues that affect state and local governments.

This case concerns a state excise tax on fuel purchased by foreign airlines, which provides a crucial source of revenue for the States during these times of fiscal crisis. The Florida Supreme Court upheld the tax against various challenges by both foreign and domestic airlines. Although this case directly involves only the validity of Florida's tax as applied to one airline based in Canada, the Court's decision in this case will affect pending cases involving the application of Florida's tax to eighteen other airlines from thirteen other foreign countries. The validity of similar taxes currently imposed by at least two other States—Illinois and New York—is also implicated.

The Florida Supreme Court held that the tax was not preempted by a bilateral aviation agreement between the United States and Canada because the agreement provides an exemption only from national customs, duties, and excise taxes. The contrary view—that the agreement impliedly preempts a state excise tax on aviation fuel—distorts this Court's preemption jurisprudence and severely intrudes on the powers and prerogatives of the States. In the absence of express preemption, this Court has appropriately insisted upon evidence of a congressional intent to occupy the field or an actual conflict between state and federal law. These concerns are particularly important in the determination whether state taxes are preempted because the state exercises a fundamental power when it imposes taxes. In our view, the federal government's admission, as *amicus curiae* in this Court, that neither federal statutes nor international agreements by their terms preclude the imposition of state taxes on aviation fuel should be conclusive of the absence of any preemption.



The Florida Supreme Court also held that the tax did not intrude upon the federal government's exclusive control over foreign affairs. In the absence of preemption, this Court should be extremely wary of limiting a state's power to tax because of the tax's alleged effect on foreign affairs. Both Congress and the Executive Branch have had considerable time and opportunities to act to preempt state excise taxes on aviation fuel purchased by foreign airlines, and neither has done so. On the basis of commitments to use "best efforts" to preclude state taxes, and in response to complaints by foreign governments about those taxes, the Executive Branch has done nothing but submit a brief to this Court; and that only in response to a request from the Court. *Amici* are very concerned that this approach to foreign relations will cut too deeply and erratically into the States' taxing power. Such approach also has the potential to eviscerate Congress' legitimate shared role in foreign relations and its role in protecting fundamental state interests. This case is not one of those rare occasions in which the Court should invalidate a state tax on the grounds of its effect on foreign affairs.

*Amici* submit that the Florida Supreme Court's decision is correct. Because a reversal of that decision will have a direct and immediate adverse effect on matters of compelling importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.

Respectfully submitted,

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February 6, 1986

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued





TABLE OF AUTHORITIES

CASES:

TABLE OF AUTHORITIES—Continued





TABLE OF AUTHORITIES—Continued

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1985

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---

## INTEREST OF *AMICI CURIAE*

The interest of *amici* is set out in the motion accompanying this brief.

## STATEMENT

Appellant, a Canadian airline, brought this action seeking an exemption from a Florida excise tax [1] on aviation

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[1] The Florida statute and the Florida Supreme Court describe the tax as an excise tax. Fla. Stat. Ann. § 206.42; App. A14. The tax also resembles a sales tax. Although the tax is collected from the dealer of aviation fuel and is "imposed for the privilege of the sale

fuel. Although appellant had been previously subject to a lesser tax on aviation fuel, appellant challenged the tax imposed by the legislature in 1983 on the ground that it violated both the Foreign Commerce Clause and the Supremacy Clause. Appellant obtained relief in the Florida Circuit Court, but the Florida Supreme Court reversed. In this Court, appellant contends: (1) that the state tax is preempted by federal legislation and international agreements, and (2) that, in any event, the tax impermissibly intrudes into the federal government's exclusive control over foreign affairs.

The facts are straightforward. Prior to April 1, 1983, Florida imposed an excise tax on fuel purchased by common carriers, such as railroads, shipping lines, and airlines, that was prorated on the basis of the proportion of each carrier's travel in Florida compared to its travel worldwide. *See Tropical Shipping & Construction Co. v. Askew*, 360 So. 2d 433 (Fla. 1978). Presumably because foreign airlines paid little or no Florida tax under this formula, they raised no complaints about the validity of the tax.

The 1983 amendment to the excise tax repealed the mileage proration formula for airlines. Fla. Stat. Ann. § 212.08(4); App. A43. As a result of the amendment, airlines paid a tax of 5 percent on a deemed price of $1.148 for each gallon of fuel purchased in Florida.[2] All airlines buying fuel in Florida thus felt an equal tax

at retail in [Florida]," the "levy of tax is upon the ultimate retail consumer" and the dealer "act[s] as agent for the state." Fla. Stat. Ann. § 212.70. For present purposes, however, the distinction between sales taxes and excise taxes is irrelevant. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 616 (1981).

[2] The statute has since been amended again. The new amendment, effective July 1, 1985, provides that a tax of 5.7 cents per gallon applies to "aviation fuel sold in this state, or brought into this state for use." 1985 Fla. Laws 85-348 § 2. Because the amendment applies prospectively (*id.*, § 9), it does not affect this appeal, which involves tax liability from April 1, 1983, to July 1, 1985.



burden.[3] An airline purchasing fuel in Miami for a flight to the Bahamas sustained the same tax burden per gallon of fuel as an airline purchasing fuel in Miami for a flight to Atlanta or Tallahassee.

Prior to passage of the amendment, an official of the United States Department of State wrote to Florida officials noting that the State Department had already received questions from foreign governments about the Florida tax. The State Department "urge[d] [Florida to] exempt foreign air carriers from taxes levied in your jurisdiction on items for which the United States Government provides [such] an exemption." App. A83. The State Department reiterated the request after the amendment passed. App. A87. In neither of these letters did the Department of State suggest that Florida lacked the power to levy the tax or that the tax was inconsistent with federal legislation or international agreements. In addition, the State Department cited no concrete threats of retaliation from foreign governments.

Soon after the amendment was enacted, a number of foreign and domestic airlines brought lawsuits in the Florida courts challenging the constitutionality of the tax. These cases were all heard before the Circuit Court of the Second Judicial Circuit in and for Leon County. The circuit court, in its first decision, rejected the claim by domestic airlines that the tax violated the Interstate Commerce Clause and the Equal Protection Clause of the United States Constitution, as well as provisions of the Florida Constitution. *Delta Air Lines, Inc. v. State of Florida, Department of Revenue*, No. 83-761 (May 23, 1983). Next, the circuit court addressed a similar challenge to the tax by a group of foreign airlines that did

[3] In *Delta Air Lines, Inc. v. Department of Revenue*, App. A8, the Florida Supreme Court invalidated a provision of the state tax laws that provided a corporate tax credit, because the tax credit discriminated against interstate commerce. The court went on, however, to hold that the tax credit provisions were severable. Florida has not sought review of that ruling in this Court.

not include appellant. The court relied on its decision in *Delta Air Lines, supra*, to reject summarily the Equal Protection and Interstate Commerce Clause claims (*Lineas Aereas Costarricenses, S.A. v. State of Florida, Department of Revenue*, App. A26), but the court accepted the argument that the tax was invalid as applied to these foreign airlines, because such application was in conflict with international air transport agreements. App. A27-A35. Turning finally to appellant's case, the circuit court took the same position that it had in *Lineas Aereas, supra*, holding that the application of the tax to appellant was inconsistent with an international agreement between the United States and Canada. App. A21.

On appeal, the Florida Supreme Court reversed. App. A1. The court began its analysis by finding that the state's tax had not been preempted by the Nonscheduled Air Service Agreement, May 8, 1974, United States-Canada, art. XII, 25 U.S.T. 787, T.I.A.S. No. 7826 [hereinafter cited as U.S.-Canada Agreement]. More specifically, the court noted that "[t]he provisions in the agreement between the United States and Canada clearly express an intent to apply to only national taxes and duties." App. A5.

The court also rejected appellant's Foreign Commerce Clause challenge. The court relied on its affirmance of the circuit court's decision in the case brought by domestic carriers (App. A8), in holding that the state tax did not violate the four-prong test under the Interstate Commerce Clause outlined in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Turning to the foreign commerce implications, the court held that the state tax did not run afoul of the two additional requirements articulated in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979). App. A5. After reiterating that the U.S.-Canada Agreement did not provide foreign carriers with an exemption from state taxes, the court stated that it did "not believe this [tax] prevents our



federal government from speaking with one voice." App. A6. Two justices dissented from this result, arguing that "the individual states of this country are precluded by [international] agreements from taxing fuel used by foreign airlines." App. A7.

This Court noted probable jurisdiction on November 4, 1985.

## SUMMARY OF ARGUMENT

This case involves a narrow constitutional challenge to the exercise of a fundamental state power: the power to tax the purchase of goods in the state. Unlike many taxes previously before this Court, the tax at issue here concededly rests upon an adequate nexus with the State; is non-discriminatory, fairly apportioned, and fairly related to services provided by the state; and presents no threat of multiple taxation. The challenge mounted by appellant thus rests upon two, and only two, grounds: first, that the tax is preempted by federal legislation and international agreements; and, second, that the State's exercise of its taxing power has impermissibly intruded upon the federal government's exclusive power over foreign affairs. Neither contention is persuasive.

1. Florida's tax on aviation fuel is not preempted by the Federal Aviation Act, 49 U.S.C. §§ 1301-1557. Under this Court's tests for determining whether Congress has preempted a state law, *see Silkwood v. Kerr-McGee Corp.*, 104 S. Ct. 615, 621 (1984), the party urging preemption must expose an inconsistency between the intent of Congress and the effect of the state law. Appellant offers no evidence that Congress intended the Federal Aviation Act to have any effect on state taxation of aviation fuel. Indeed, the Act expresses an intent to permit state taxes like Florida's.

Nor is Florida's tax preempted by an international agreement between Canada and the United States. Both of the international agreements cited by appellant were specifically intended not to override state taxes, such as Florida's, and thus obviously do not preempt them. *See*

*Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 105 S. Ct. 2371, 2375 (1985). Moreover, the State Department, which was a party to those agreements, concedes that neither preempts Florida's tax. That concession alone should be dispositive. *See id.* at 2376.

2. Having survived a challenge based on actual preemption, the Florida tax should not be struck down because of speculation that it interferes with the ability of the federal government "to speak with one voice" regarding foreign commerce. In marking out the permissible line between state taxing power and the dormant federal power over commerce, the Court should give wide latitude to state taxes that are non-discriminatory and fairly apportioned, and that could not result in multiple taxation. In particular, the Judicial Branch should be reluctant to impose an essentially standardless judgment regarding the impact of a state tax on foreign commerce, particularly when, as here, the coordinate branches have not preempted the tax despite a clear opportunity to do so. In such circumstances, the Court should apply a strong presumption that an otherwise valid state tax can coexist with the dominant federal power over foreign commerce. No showing has been made in this case to overcome the presumption.

## ARGUMENT

We begin with a straightforward proposition: the power to tax is of virtually unique importance to the States. Indeed, for over two centuries, this power has been recognized as a fundamental aspect of state sovereignty. For example, as part of the debate over ratifying the Constitution, Alexander Hamilton wrote in *The Federalist* No. 32, at 197-98 (Rossiter ed. 1961), that "the individual States should possess an independent and uncontrollable authority to raise their own revenues." He went on to note that, with the exception of duties on imports and exports, States "retain [the authority to tax] in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it would be a violent assumption of power, unwarranted by any article or clause of its Constitution." *Id.* at 198.



Notwithstanding these strong sentiments, it is by now well-established that the state power to tax is necessarily subordinate to particular powers of the National Government. Nevertheless, the Court has repeatedly stressed the importance of this state power, even when balanced against Commerce Clause limitations. *See, e.g., Container Corp. v. Franchise Tax Board*, 103 S. Ct. 2933, 2955 (1983); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 616 (1981). Moreover, the excise tax challenged here is not a new or novel exercise of the taxing power: States have traditionally levied this sort of excise tax on goods purchased within their borders. *See, e.g., United Air Lines, Inc. v. Mahin*, 410 U.S. 623 (1973); *Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249 (1933).

In seeking to set aside Florida's tax, appellant raises two distinct, though related, claims. First, it argues that the federal government has affirmatively preempted the tax. As we discuss below, however, nothing cited by appellant comes close to the sort of clear indication of an intent to preempt that this Court has required before striking down otherwise valid state action. Second, appellant contends that, even if the tax has not been preempted, this Court must declare that it interferes impermissibly with the power of the federal government "to speak with one voice" regarding foreign commerce. As we further discuss, appellant has not shown the unusual threat to federal authority that would justify setting aside the state taxing power under this largely speculative standard.

### I. NEITHER CONGRESS NOR THE EXECUTIVE BRANCH HAS AFFIRMATIVELY PREEMPTED STATE POWER TO IMPOSE EXCISE TAXES ON AVIATION FUEL.

To support its arguments regarding preemption, appellant has touched upon a variety of materials ranging from the general provisions of the Federal Aviation Act

to highly specific, though inapposite, provisions of an international agreement between the United States and Canada. None of these provisions preempts the tax at issue here.

### A. The Federal Aviation Act Does Not Preempt Florida's Tax.

This Court in the past several years has had repeated occasions on which to articulate the standards governing preemption of state legislation. As the Court has made clear, each of the different formulations is a variation on the inquiry into whether Congress intended to override the specific state law in question. *See Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152 (1982). Of course, Congress can expressly preempt state law in areas of national concern. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). In addition, "[i]f Congress evidences an intent to occupy a given field, any state law falling within that field is preempted." *Silkwood, supra*, 104 S. Ct. at 621. Finally, a state law is preempted "to the extent it actually conflicts with federal law," or "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Ibid.*

Appellant concedes that the Federal Aviation Act, 49 U.S.C. §§ 1301-1557, does not expressly preempt the Florida tax on aviation fuel. It thus begins its preemption analysis at the second stage, contending that the act instead expresses a congressional intention to occupy the field of aviation regulation. The problem with this argument, however, is that it fails to consider two important preemption principles. First, this Court has repeatedly held that, in the absence of express preemption, Congress must express an intent to occupy the *specific* field covered by the challenged state law. *See, e.g., Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 103 S. Ct. 1713, 1726-27 (1983); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947). Second, the Court has indicated



that such an intention must be especially explicit in order to overcome the "presumption" that the exercise of a fundamental state power "can constitutionally coexist with federal regulation," *Hillsborough County, supra*, 105 S. Ct. at 2376.

The Court's decision in *Silkwood, supra*, 104 S.Ct. at 622-24, provides a good example of these principles. There, the Court held that federal statutes governing nuclear energy did not preempt state law allowing the award of punitive damages for tort law violations by nuclear facilities. Although it was beyond dispute that the federal government had taken a primary and extensive role in the regulation of nuclear energy, such extensive federal regulation did not mean that all state laws having an incidental connection with nuclear energy were preempted. Instead, the Court in *Silkwood* examined whether there was evidence in the statute or legislative history that Congress meant to occupy the area of remedies for nuclear energy accidents. The Court found no explicit evidence of such intent. *Ibid.*

Applying those principles to this case, we concede at the outset that Congress has taken an extensive role in the regulation of aviation. But appellant has shown no intention on the part of Congress to occupy the field of state taxation of aviation fuel. To the contrary, when the Act addresses the subject of state taxes affecting aviation, it indicates a congressional intention to permit state taxes like Florida's. *See* 49 U.S.C. § 1513. As this Court has observed, Congress chose expressly to preempt "a limited number of state taxes" in seection 1513(a), and to distinguish other state taxes "reserved in § 1513(b)." *Aloha Airlines, Inc. v. Director of Taxation*, 104 S. Ct. 291, 294 n.6 (1983). Thus, section 1513(a) prohibits the States from levying any tax "on persons traveling in air commerce or on the carriage of persons traveling in air commerce." The Court has indicated that Congress intended by this provision to forbid the States from levying taxes focused on airline passengers, such as head taxes

and gross receipts taxes. *See* 104 S. Ct. at 294-95 (discussing legislative history). Section 1513(b), by contrast, expressly permits the States to impose other taxes to be paid by air carriers (*id.* at 294 n.6), by allowing "property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services." 49 U.S.C. § 1513(b). Florida's excise tax on aviation fuel clearly falls within this latter category.

Appellant cites nothing of comparable clarity to support its position. Indeed, when describing the scope of the federal exercise of power under the Act, appellant mentions "licensing, route services and other air services, rates and fares, tariffs, competition, [and] safety" (Appellant's Brief 37), but not state taxes on fuel. Nor do the provisions that apply specifically to foreign air carriers expressly occupy the field of state taxation. Although appellant places much emphasis on the fact that the Act requires foreign airlines to have a federal permit (*see* 49 U.S.C. § 1372), these permit procedures focus solely on the qualifications of the foreign carrier itself, not on the carrier's obligations under state law. Similarly, although appellant points out that Congress had delegated to the Department of State the power to negotiate air transport agreements with foreign nations (*see* 49 U.S.C. §§ 1462, 1502),[4] the mere delegation of authority to act, and by such actions to preempt, is not equivalent to a congressional intent to preempt. *See Hillsborough County, supra.*

Appellant is no more convincing in its submission that the state tax is in direct conflict with the Act. Although appellant raises the problem of a conflict in general terms, it fails to point to a single provision of the Act that actually conflicts with Florida's tax. This Court has stated that, in order for the requisite conflict to exist, it must be

[4] These provisions may simply qualify the Executive's authority to enter into binding international agreements by requiring the Department of State to consult with the Department of Transportation. 49 U.S.C. §§ 1462, 1502(b).



impossible for someone to follow the provisions of both federal and state law. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). Appellant has not suggested any way in which it is unable to satisfy the provisions of the Act if it pays the Florida tax.

Finally, contrary to appellant's position, the state tax does not stand as an obstacle to any of the Act's purposes. As this Court has recently made clear, this standard also requires a specific inconsistency between federal and state law. For example, in *Silkwood, supra*, 104 S. Ct. at 621, the Court cited *Hines v. Davidowitz*, 312 U.S. 52 (1941), as a case illustrating how a state law can stand as an obstacle to a federal statute. The Court in *Hines* held that the federal Alien Registration Act preempted a state alien registration act. The Court began by noting the federal power "to restrict, limit, regulate, and register aliens" (*id.* at 68), but did not find preemption on this ground. Rather, the Court held that the state law could not stand because Congress intended the federal statute to provide the sole standard for such restrictions on aliens, and the state statute provided an inconsistent standard. There is no comparable inconsistency between federal and state law here, and thus no interference with federal objectives.

### B. Florida's Tax Is Not Preempted by International Agreements Between the United States and Canada.

The extent of the Executive's authority to enter into international agreements that bind the United States, and by extension override state law, has by no means been clearly drawn by this Court. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654 (1981); L. Henkin, *Foreign Affairs and the Constitution*, 173-88 (1972). In this case, however, the Court need not assess the inherent authority of the Executive to act in this sphere because, as noted above, Congress has expressly delegated to the Executive the power to enter into international agreements concerning air transportation. 49 U.S.C. §§ 1462, 1502. At the same

time, the Court need not address whether that delegation includes the authority to preempt state tax laws, because it is clear that the international agreements cited by appellant do not bar Florida from taxing aviation fuel sold to appellant within the State. No matter which preemption standard the Court looks to, Florida's tax is not preempted, because the agreements themselves recognize the validity of such taxes. A federal rule that exempts a state law obviously does not preempt it. *See Hillsborough County*, *supra*, 105 S. Ct. at 2375-76.

Appellant places great reliance in its brief on the provisions of the U.S.-Canada Agreement, *supra*, arguing that the Agreement by its terms was intended to foreclose state taxing power.[5] The language of the Agreement, however, betrays that position. The Agreement—like many international agreements in this area[6]—limits itself to exempting foreign air carriers, such as appellant, from "*national* duties and charges" on aviation fuel. App. A58 (emphasis added). Indeed, the use in the Agreement of the word "national" is strong evidence that state taxes were *not* intended to be covered, given the existence of other agreements in the air transportation area that do distinguish between state taxes and national taxes.[7] We

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[5] An international agreement addresses only the relations between the contracting parties. Thus, a single international agreement cannot preempt a state law as applied to all foreign carriers engaged in commerce in the state but at most as applied to those carriers engaged in commerce between the state and the foreign contracting nation.

[6] *See, e.g.*, Air Transport Services Agreement, Aug. 15, 1960, United States-Mexico, art. 7, 25 U.S.T. 65; Air Transport Services Agreement, Jan. 8, 1947, United States-Ecuador, art. 3(b), 61 Stat. 2775.

[7] As noted in the federal government's brief, a number of international agreements in this area bar national taxes while obligating the Executive to use its "best efforts" to secure exemptions for foreign carriers from state and local taxes on aviation fuel. U.S. Brief on Appeal 16-17.

Even these best-efforts provisions, however, cannot fairly be read to preempt state tax laws. The provisions are not self-executing and thus cannot be said by themselves to preempt state law. More important, undertaking an obligation to use "best efforts" to effect a result is an admission that the result is not already effected. Thus, these best efforts provisions simply oblige the Executive to take reasonable steps in opposition to such laws—for example, the sending of notes to taxing authorities. Both the Department of State and various foreign governments have interpreted these provisions this way. In the State Department's letters to Florida, the Executive never stated that the state lacked the power to tax in light of any international agreement. *See* App. A82-A83, A87. And although the diplomatic notes from foreign governments included in the appendix to the federal government's brief encourage the State Department to oppose Florida's tax, only a few suggest that the tax is in fact preempted by international agreement. U.S. Brief on Appeal 22, 1a-58a. It is not clear why the State Department thought that sending notes to Florida was likely to be more effective than legislation or international agreements under 49 U.S.C. §§ 1462, 1502.

*Amici* also submit that none of these agreements other than the U.S.-Canada Agreement governs whether Florida's tax as applied to appellant is preempted, nor is the potential preemptive effect of these other agreements on Florida's tax as applied to other foreign carriers doing business in Florida an issue in this case. It may be that certain of the international agreements are more susceptible to an interpretation that they preempt state law because they do not contain language limiting the exemption from taxation. The Court, however, should address each preemption case on its own merits. *See Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 n.12 (1982). Moreover, if the absence of limiting language is relevant to the preemptive effect of these other agreements, the presence of such language is surely relevant to nonpreemption in this case.



note that, in *Container Corp.*, *supra*, 103 S.Ct. at 2956, the Court relied on this same distinction in holding that an international agreement did not preempt the tax challenged in that case.[8]

This interpretation is supported by that given to the Agreement by both the Canadian government and the State Department. For its part, Canada allows its own

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[8] In addition, Congress was aware of state taxation affecting air carriers in 1973—prior to the signing of the U.S.-Canada Agreement—when it preserved state power to tax the sale of goods and services to air carriers. *See* 49 U.S.C. § 1513(b).

provinces to tax the aviation fuel of American air carriers. U.S. Brief on Appeal 13. Not surprisingly, therefore, the record reveals no evidence that Canada has made any complaints about Florida's tax. It has neither sent a diplomatic note nor presented its views in this litigation. Similarly, the State Department, whose views are presented in the federal government's brief, concedes that the U.S.-Canada Agreement does not preempt Florida's tax. U.S. Brief on Appeal 17. The Court has suggested that such an interpretation by the agency delegated by Congress with the authority to preempt state law is usually dispositive. *See Hillsborough County*, *supra*, 105 S. Ct. at 2376; *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982); Restatement (Second) of Foreign Relations Law of the United States § 152 (1965).

We also note that the question of preemption must be viewed even more critically when it is a federal agency, rather than Congress, that is said to have acted to preempt. In *Hillsborough County*, *supra*, 105 S. Ct. at 2379, the Court indicated that, under such circumstances, the intent to preempt must be even more specific. There, the Court noted that the Federal Drug Administration had the ability to make its intentions clear and "[could] be expected to monitor, on a continuing basis" the relationship between federal obligations and state law. *Ibid.* The Department of State, of course, occupies a similar position in the field of foreign affairs. In short, the State Department was aware of state taxes on aviation fuel and, we assume *arguendo*, could have and still can preempt them explicitly in an international agreement.

Nor does the Florida tax conflict in any way with the Chicago Convention on International Civil Aviation, *opened for signature*, Dec. 7, 1944, 61 Stat. 1180. As appellant must concede, the Convention only addresses state and local taxes on fuel carried into the United States, not fuel purchased here. 61 Stat. at 1186. Indeed, like the U.S.-Canada Agreement, the provisions of the Convention by negative implication support Florida's



power to tax. Its terms confirm that the international community has long been aware of the burden of state and local taxes, and that the parties contracting international agreements know how to include a provision expressly preempting such taxes if they desire to do so.

Finally, appellant cites the resolutions of the International Civil Aviation Organization (ICAO), which was established by the Chicago Convention, as authority for preemption. Even if those resolutions do reveal an international interest in exempting foreign airlines from state and local taxes,[9] this Court has never suggested that the statement of an interest in a broad, unsigned resolution preempts state law. The resolutions of the ICAO are not a source of federal law that can override state law under the Supremacy Clause. *See* L. Henkin, *supra*, at 194-95; *see also* Restatement, *supra*, §§ 130-31 (discussing treaties and international agreements).[10] Indeed, the State Department in its brief indicates that the ICAO did not intend the resolution to be a source of law. U.S. Brief on Appeal 11-13. Moreover, the expression of international concern about state taxes as early as 1966 again cuts against appellant's argument, by revealing that the United States and Canada could have expressly ad-

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[9] One resolution covers taxes levied "by any taxing authority within a State." The term "State" in the resolution in fact refers to contracting nations. Thus, it remains a question of interpretation whether Florida is a "taxing authority within" the United States. Even if it is, however, the resolution does not support appellant's argument, because the resolution only provides for reciprocity between nations. As noted above, there is currently taxing reciprocity between the United States and Canada.

[10] Both appellant and the federal government rely in part on the fact that most nations prohibit local taxes on aviation fuel. This Court, however, has indicated that international practice does not play a decisive role in its assessment of a state tax under the Foreign Commerce Clause. *See Container Corp.*, *supra*, 103 S. Ct. at 2956-57; *Japan Line*, *supra*, 441 U.S. at 442-43. Furthermore, Canada, the only foreign nation directly implicated in this case, permits local taxes on aviation fuel.

dressed the issue of state taxes in the later U.S.-Canada Agreement if they had intended to prohibit such taxes.

The cases relied upon by appellant add nothing to its argument. In both *United States v. Pink,* 315 U.S. 203 (1942), and *United States v. Belmont,* 301 U.S. 324 (1937), this Court held only that state law could not be applied in light of an international agreement between the United States and the Soviet Union. The cases simply confirm the abstract proposition that an international agreement can preempt state law. Both cases involved refusals by state courts to recognize decisions by a foreign government that the Executive had agreed to recognize, creating a specific conflict between the state law rule and the international agreement. More to the point here, however, are the repeated statements by this Court that a treaty or international agreement does not override a state law unless that intention is clearly stated. *See Guaranty Trust Co. v. United States,* 304 U.S. 126, 143 (1938). None of the materials relied on by appellant provides such a clear displacement of Florida's excise tax on aviation fuel.

## II. THE FLORIDA TAX DOES NOT IMPERMISSIBLY INTERFERE WITH THE POWER OF THE FEDERAL GOVERNMENT TO SPEAK WITH ONE VOICE REGARDING FOREIGN COMMERCE.

Because the federal government has not affirmatively preempted the Florida excise tax, the remaining question is whether this Court should hold that the tax nonetheless interferes with the federal power to speak with one voice regarding foreign commerce. We submit that it should not, for several reasons.

First, we believe that the decisions of this Court, in both the interstate and foreign commerce areas, have correctly moved away from efforts to invalidate state laws on the general ground that they interfere with uniform federal treatment. Rather, the Court has recognized that state taxes are to be presumed valid unless they



involve more concrete forms of intrusion upon commerce, such as discrimination, improper apportionment, or, in the case of foreign commerce, multiple taxation. Second, we submit that the courts are generally in a poor position to decide whether a state tax does, in fact, so hobble federal power that it cannot compatibly survive. Because Congress and the Executive Branch have unquestioned power to preempt those taxes truly deemed burdensome, the courts should be reluctant to override state sovereignty in the absence of the clearest sort of showing of improper intrusion. Finally, we think that the evidence of obstruction in this case is particularly thin. Neither appellant nor the United States as *amicus curiae* has demonstrated the type of risk to the conduct of foreign affairs that would justify striking down a state tax that Congress and the Executive Branch have not chosen to preempt.

### A. The Uniformity Principle is Not the Touchstone for the Validity of State Taxes Under the Interstate and Foreign Commerce Clauses.

The attempt to limit state powers based upon an asserted need for uniform federal treatment is hardly an unusual one. This Court has long recognized that, under the Interstate and Foreign Commerce Clauses, the regulation of such commerce is the exclusive domain of the federal government. Thus, the Court early on held that certain state laws were invalid because the needs of foreign or interstate commerce required a uniform federal rule, even though Congress had not already provided such a rule. *See, e.g., Henderson v. Mayor of City of New York,* 92 U.S. 259 (1875); *Brown v. Maryland,* 25 U.S. (12 Wheat.) 419 (1827). Nevertheless, as the Nation expanded and commerce developed, it became clear that too literal an application of the rule of uniformity would severely limit traditional state powers. Given the fact that most state legislation has some effect on interstate or foreign commerce, the Court has taken a more accommodating view toward the inevitable conflict between the ex-

clusive federal control over foreign and interstate commerce and the incidental effects of state law on such commerce.

The vagaries of this conflict are well illustrated in the cases addressing challenges to state taxes [11] based upon the Interstate Commerce Clause. The early cases in this area took the stern view that any intrusion into the federal sphere was an impermissible breach of the need for uniformity. *See, e.g., Brown v. Maryland, supra.* Later, however, the Court modified that broad prohibition, attempting instead to delineate standards that distinguished between impermissible taxes on commerce itself, *see, e.g., Helson v. Kentucky,* 279 U.S. 245 (1929), and permissible taxes on local actions, *see, e.g., Edelman v. Boeing Air Transport, Inc.,* 289 U.S. 249 (1933).[12] This distinction between direct and indirect taxes on commerce was defined in large part on the basis of the Court's case-by-case assessment of the need for uniform rules in interstate commerce. *See Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440, 448 (1960).

The boundary between direct and indirect burdens on commerce ultimately proved unsatisfactory. In more recent times, the Court has moved to abandon any bright line limiting the taxing power of the states based on the perceived need for federal uniformity in interstate commerce. Without reviewing this movement in detail, it is sufficient to note that the Court gradually evolved a four-part test that draws upon various principles identified in earlier cases but does not turn on the absence or presence of a need for uniformity *per se. See Complete Auto Transit, supra.* Thus, the Court in *Complete Auto Transit* held that a state tax does not violate the Interstate Commerce Clause if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." 430 U.S. at 279.

This four-part test, as presently applied by the Court, protects interstate commerce from certain measurable intrusions by state governments without subjecting state actions to the sort of judicial guesswork invited by the notion of federal "uniformity." The first factor merely echoes the due process limit on taxation: namely, that States must enjoy some minimum relationship with the

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[11] In *Northwestern States Portland Cement Co. v. State of Minnesota,* 358 U.S. 450, 457-58 (1959), the Court wrote:

> Commerce between the States having grown up like Topsy, the Congress meanwhile not having undertaken to regulate taxation of it, and the States having understandably persisted in their efforts to get some return for the substantial benefits they have afforded it, there is little wonder that there has been no end of cases testing out state tax levies. The resulting judicial application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation. This Court alone has handed down some three hundred full-dress opinions spread through slightly more than that number of our reports. As was said in *Miller Bros. Co. v. State of Maryland,* 1954, 347 U.S. 340, 344, the decisions have been "not always clear * * * consistent or reconcilable. A few have been specifically overruled, while others no longer fully represent the present state of the law."

[12] It was in these cases that the Court held that a state could not tax an "instrumentality of commerce" at all. *See Helson, supra.* Appellant argues that aviation fuel is an instrumentality of commerce. We do not argue this point, except to note the difficulty of determining why fuel is any more an "instrumentality of commerce," than, for example, the food served on board. *Amici* submit that, in any event, the question whether aviation fuel is an instrumentality of commerce is not controlling, because the Court has abandoned this standard for Commerce Clause analysis. Although *Japan Line, supra,* describes the shipping containers as instrumentalities of commerce, the description does not seem to have been intended the revive the constitutional significance that the term once had. The Court's discussion attributes no significance to the fact that the containers were instrumentalities of commerce; and the holding did not turn, even in part, on this fact.

entity or event to be taxed. *See Commonwealth Edison, supra,* 453 U.S. at 622-26. The second and third factors reflect the kind of quantifiable burdens that the Court has recognized as genuine threats to the federal system and the flow of interstate commerce. *See Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 457 (1959). The apportionment standard, for example, prevents States from burdening commerce with multiple taxation (*see Department of Revenue v. Association of Washington Stevedoring Cos.,* 435 U.S. 734, 746 (1978)), while the discrimination test guarantees that the effects of state taxes are felt without regard to state boundaries. *See Commonwealth Edison, supra,* 453 U.S. at 618-19. The courts can play an effective role in limiting these burdens on interstate commerce because the courts are actually better positioned than Congress to develop a record for determining whether a tax discriminates against interstate commerce or results in multiple taxation.

The Court has expressed a clear unwillingness, however, to go beyond these reasonably structured inquiries. For example, in *Commonwealth Edison, supra,* 453 U.S. at 628, the Court rejected the argument that it should use the fourth factor—whether a tax is fairly related to services provided by the state—to assess whether a state tax was so high as to offend the dominant federal power. In declining to undertake that review, the Court advised that Congress has the prime responsibility for determining which state taxes are "contrary to federal interest." Thus, in contrast to its active posture in assessing discrimination and the threat of multiple taxation, the Court has taken a more deferential view of state power in light of bare assertions of a paramount "federal interest."

The same course should be followed in the context of the Foreign Commerce Clause. As this Court indicated in *Japan Line, supra,* a case involving a Foreign Commerce Clause challenge to a California ad valorem property tax on shipping containers, the basic analysis under



the Foreign Commerce Clause tracks the four-prong inquiry used in the interstate context (*see Complete Auto Transit, supra,* 430 U.S. at 279). In addition, however, the Court identified two other factors that must be considered: "the enhanced risk of multiple taxation" in the international context (441 U.S. at 446), and the possibility that a state tax "may impair federal uniformity in an area where federal uniformity is essential" (*id.* at 448). Describing this uniformity principle, the Court quoted language from a recent decision interpreting the Import-Export Clause, noting "the Framers' overriding concern that 'the Federal Government must speak with one voice when regulating commercial relations with foreign governments.'" 441 U.S. at 449 (quoting *Michelin Tire Corp. v. Wages,* 423 U.S. 276, 285 (1976)).

Although appellant and the United States appear to take this reference to a "one voice" standard as an endorsement of the sort of "uniformity" inquiry largely abandoned in interstate commerce cases, we think that view of the Court's recent cases to be considerably overstated. To begin with, in actually applying the "one voice" notion, the Court has recognized that the principal inquiry to be made is whether the federal government has chosen to mark out an area for uniform treatment through exercise of its powers of preemption. We have no quarrel with that view. Our point is simply that, when the federal government has not preempted state action, the courts should be hesitant to fashion their own version of preemption based solely on the idea of "one voice" over foreign commerce. The decision in *Japan Line* says nothing to the contrary on that issue.

We also note that the "one voice" standard suffers from the same central defect as the concept of "uniformity" in interstate commerce: it speaks to only one side of the balance at stake. As was the case in the field of interstate commerce, virtually any state tax affecting foreign commerce can be said to affect uniform federal treatment and thus, under a rigid application of the "one

voice" principle, be impermissible. But that analysis ultimately does nothing more than restate the essential question, which is whether the tax so interferes with the need for one dominant power that it cannot stand. The answer to that question depends upon a more sensitive balancing of the interests involved.[13]

This Court, in fact, recognized as much in *Container Corp., supra*. There, the Court stated that, even absent preemption, the uniformity principle would be violated if the state tax "implicates foreign policy issues which must be left to the federal government." 103 S. Ct. at 2955. At the same time, however, the Court expressly admonished that such foreign policy concerns had to be balanced against "the sovereign right of the United States as a whole to let the States tax as they please." *Ibid.* The Court in *Container Corp.* concluded that the balance in that case must be struck in favor of permitting the State to exercise its power.

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[13] Indeed, the origins of the "one voice" language show that it was never intended to serve by itself as a measure for this Court's assessment of state taxes under the Foreign Commerce Clause. In *Michelin Tire, supra*, the Court used that language to describe the purpose of the Import-Export Clause, which articulates an absolute limit on the States' power to have any taxes on import or exports. While the Import-Export Clause limits all taxes in a defined area, the Foreign Commerce Clause, like the Interstate Commerce Clause, does not provide such an inflexible limitation on state taxing power. *See The Federalist* No. 32, *supra*. Instead, under the Commerce Clauses, the Court must attempt to distinguish between those taxes that are permissible and those taxes that are not, even though both kinds of taxes have some effect on foreign or interstate commerce. *See Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328-29 (1977).

By the same token, this case must be distinguished from cases in which the States are attempting directly to participate in foreign affairs. *See, e.g., Zschernig v. Miller*, 389 U.S. 429 (1968). Such cases, like those involving the Import-Export Clause, do not involve striking a balance between state taxing power and the effect of a given state tax on foreign affairs, but turn on whether the State has acted in a defined area that is expressly reserved for federal control.



This Court has also acknowledged that the "one voice" doctrine, if applied as appellant urges, will unavoidably lead the courts into difficult and uncertain inquiries. Thus, the Court noted in *Container Corp., supra*, that it has no special competence "in determining precisely when foreign nations will be offended by particular acts, and . . . in deciding how to balance" foreign policy concerns against state taxing power. *Ibid.* The problem is made even more difficult when the issue arises, as it frequently will arise, in the context of garden-variety commercial litigation. In such cases, like this one, the foreign policy concerns of the United States will often be presented by a taxpayer simply seeking to evade a tax rather than by the United States at its own initiation. The line between private economic concerns and public foreign policy concerns may thus prove particularly troublesome to discern.

The process of identifying federal policy through litigation will also create needless uncertainty for state legislatures. As we have already noted, in the usual order of analysis, a court will be faced with the argument that a state tax conflicts with the "one voice" principle only after it has already decided that the tax is non-discriminatory, fairly apportioned, not likely to result in multiple taxation,[14] and, further, that it has not been preempted by Congress or by the Executive Branch. In such circumstances, we think that it will be the rare case where the impact of a tax is so harmful to federal foreign policy that it cannot coexist with that policy. Yet, because the "one voice" standard seems to carry the seeds of a presumption against taxes affecting foreign commerce, there is no way short of litigation for the legislature to tell with any certitude whether a particular tax is valid or not.

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[14] Although the apportionment factor in *Complete Auto Transit, supra*, protects against multiple taxation, *Japan Line, supra*, makes clear that the foreign context raises special concerns about multiple taxation, because of the courts' inability to review foreign taxes. In this case, of course, there is no risk of multiple taxation of the fuel purchased in Florida.

In our view, this tension between state taxing power and federal control over commerce is largely unnecessary. At bottom, the judgments about the latitude to be given state legislatures and the possible impact of their actions on foreign affairs are ones of policy: political choices about how much impact should be tolerated to allow full exercise of the States' sovereign powers. In the absence of clear evidence to the contrary, we submit that the Court should assume a willingness on the part of the federal government to tolerate state taxes meeting all other standards for legitimacy under the Interstate and Foreign Commerce Clauses. At the very least, the Court should require some indication why, if the tax truly does interfere with important federal policy, Congress or the Executive Branch has not taken steps to preempt it. Indeed, in this case, Congress has expressed an intention to tolerate state taxes, like Florida's, on the sale of goods and services to air carriers. *See* 49 U.S.C. § 1513(b).

The Court need not decide here when, if ever, the "one voice" standard by itself would be a satisfactory basis for striking down an otherwise valid state tax. For present purposes, it is enough simply to hold that a tax meeting all other standards under *Japan Line*, and not preempted by the federal government, carries with it a strong presumption of validity. As we discuss below, nothing in the record of this case approaches the sort of showing necessary to overcome that presumption.

### B. Florida's Tax Should Not Be Invalidated on the Ground that It Impermissibly Interferes with Foreign Affairs.

Once the maze of different standards under the Foreign Commerce Clause has been negotiated, this case comes down to a narrow inquiry. Neither Congress nor the Executive has affirmatively preempted Florida's tax. See pages 7-16 *supra*. And appellant concedes, as it must, that this case does not involve a threat of discrimination or multiple taxation. The sole question thus is whether



Florida's tax is one of those rare taxes that so interferes with important federal policy that this Court should declare it unconstitutional.

Although appellant and the United States advance a series of different arguments for their position that the state tax does improperly interfere with dominant federal policy, many of these arguments depend upon the same materials cited to show preemption by Congress and the State Department. As we have already discussed, none of these materials makes it clear that federal policy requires the preclusion of state taxes on aviation fuel. In addition, however, appellant and the United States point to two other factors that, in their view, show an overriding federal interest in the invalidation of the Florida excise tax: the threat of retaliation and the position taken by the State Department before this Court. Neither of these factors should be held controlling.

#### 1. *The threat of retaliation*

References to possible retaliation, as a ground for overturning a state tax, must be treated with some caution. First, the threat of retaliation may presumably be put forward in every case where a foreign government does not have a similar or equal tax. Thus, an argument based on possible retaliation does very little to separate taxes with acceptable effects on foreign commerce from those with unacceptable effects. Moreover, quite apart from the ubiquity of the concern, we think that even the *fact* of a retaliatory tax, as opposed to a mere threat, would not be sufficient to justify *automatic* invalidation of a state tax: Congress may believe that some additional tax on American companies abroad is a perfectly acceptable price to pay for respecting the States' sovereign power to tax at home.[15] The federal interest in interstate commerce is

[15] Although the Court in *Japan Line, supra*, invalidated a state tax, it did not rely on a finding that the tax was permissible in all respects save its encroachment upon the federal government's exclusive power over foreign affairs. The Court noted that the threat

not necessarily served by whatever policy results in the lowest rate of overall taxation.

We thus submit that mere threats of retaliation should be given little weight. If the threat is real and significant, Congress and the Executive Branch have the capacity to recognize it and, in addition, either to discourage it or accommodate it by statute or agreement. For the Judicial Branch, by contrast, the only choices are to ignore the threat or capitulate to it by invalidating the tax. In our view, the matter of dealing with retaliation is best left to other branches.

In any event, this case is hardly an attractive one in which to invalidate a state tax because of possible retaliation.[16] Retaliation is simply not a factor in this case. First, the record is devoid of evidence of any threat of retaliation by the Canadian Government. Although several foreign governments have presented the State Department with diplomatic notes, *see* U.S. Brief on Appeal 1a-58a, none was received from the Canadian government. Moreover, the State Department offers no evidence of any other kinds of foreign policy repercussions with Canada.

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of retaliation by foreign governments was a consideration in whether the State exceeded its taxing power (441 U.S. at 450); yet, the Court was concerned with the threat of retaliation that might result from multiple taxation. *Id.* at 452-55. The Court evidenced similar concerns in both *Container Corp., supra,* 103 S. Ct. at 2955-56, and *Mobil Oil Corp. v. Commissioner of Taxes of Vermont,* 445 U.S. 425, 446-49 (1980). This case, of course, poses no risk of multiple taxation.

[16] The federal government makes much of the fact that the Court in *Container Corp.* distinguished its holding sustaining a state tax from its decision in *Japan Line,* invalidating a state tax, in part, on the basis that *Container Corp.* involved a challenge by a domestic corporation while *Japan Line* involved a challenge by a foreign corporation. These cases should not, however, be read to provide an exception from state taxes for foreign corporations. Just as the Interstate Commerce Clause does not totally exempt domestic out-of-state corporations from state taxes, so, too, the Foreign Commerce Clause does not totally exempt foreign corporations.



Second, and perhaps most telling, some of the Canadian provinces themselves levy a similar tax. Thus, it is highly doubtful that the Canadian Government has any legitimate basis for a complaint about the Florida tax.[17]

### 2. *The submission of the United States*

The brief filed by the United States as *amicus curiae* in this Court presents somewhat different problems. Although the informed views of the State Department are not irrelevant (*see Container Corp., supra,* 103 S. Ct. at 2956), it would seem anomalous to uphold a state tax against a preemption challenge based on the formal actions by Congress and the Executive, only to strike it down based on a general statement of preference in a brief submitted to this Court. In our view, a federal policy articulated in a brief submitted at the invitation of this Court should typically be regarded as insufficient to override a state tax.

To begin with, we think that a requirement of more formal action carries with it a more fitting respect for state lawmaking. As we have said, the ultimate decision about state taxes in a case such as this is one of policy: a balancing of state power against federal interests in certain practices of trade. Although the federal government has the power to declare its interest dominant, it is essential to ensure that the policy decision to do so is made with sufficient formality and reflection. We note,

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[17] Moreover, *amici* submit that Florida's tax is valid as applied more generally. There is no compelling evidence in the record that any foreign government is going to retaliate in any way that poses serious foreign relations repercussions. Indeed, the diplomatic notes in the record contain few actual threats of any retaliatory action. Most simply request the State Department to oppose Florida's tax. There is almost no evidence about what these foreign governments will do if this Court upholds Florida's taxing power. A suggestion by this Court that Florida's tax appears to be valid generally may merely lead to an effort by the State Department and foreign governments that oppose the tax to enter into international agreements that directly address the relevant foreign policy concerns.

for example, that the views of the United States have not been part of this case at all, until this Court invited the Solicitor General to express those views. That last-minute intervention should not be the benchmark for determining whether state power can properly be exercised.

We also think a more formal process will allow for the proper interaction among the branches of the federal government. As the Court has made clear, the "nuances [of foreign policy] are much more the province of the Executive Branch and Congress than of this Court." *Container Corp., supra*, 103 S. Ct. at 2956. The primacy of formal action by the Executive and Congress, through international agreement or federal statute, preserves the important role that Congress plays in balancing the taxing power of the States against the foreign affairs power of the federal government. This congressional role has been acknowledged by all three branches of the federal government. The State Department admits in its brief that a possible conflict with state law is a factor in determining whether to proceed by international agreement, in which Congress plays no active role, or by treaty, which must be approved by the Senate. U.S. Brief on Appeal 18. Thus, Congress has decided to take a more formal role in the context of international agreements by enacting legislation that requires the Secretary of State to provide Congress with all such agreements. *See* 1 U.S.C. § 112b. This monitoring, in turn, gives Congress increased opportunities to react to international agreements that it finds inappropriate. And this Court has repeatedly noted the significance of the shared responsibilities of Congress and the Executive in foreign relations, *see Dames & Moore, supra*, as well as the role of Congress in guarding fundamental state interests, *see Garcia v. San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005, 1017-20 (1975).[18]

[18] The Court's recent acceptance of agency regulations for the purposes of statutory interpretation provide an apt analogy. The Court has held that it will follow a reasonable regulation promulgated by the agency charged with the statute's enforcement. *See, e.g., Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 104 S.Ct. 2778, 2781-83 (1984). This acceptance is based in part on the recognition that Congress has delegated certain authority to the agency to fill in gaps in a statute by regulation. *Id.* at 2782. At the same time, the Court has never suggested that it would rely on the same principles in accepting an agency position evidenced solely by its brief before this Court.



We do not rule out the possibility that, in some cases, more formal action might be inappropriate or impractical. But this case is not one of them. To the contrary, the international agreements entered into by the Executive bear witness to its awareness of the state taxing power for decades. Despite that awareness, however, the Executive has repeatedly failed to take any action expressly to preempt those taxes. Nor has the State Department explained why any foreign policy problems could not be remedied through agreements that expressly preempt Florida's tax as applied to foreign commerce. *See* 49 U.S.C. §§ 1462, 1502. Finally, the State Department offered its views in the litigation challenging the tax only after the appeal was docketed in this Court and only after the Court expressly requested that the United States take a position. Even so, the Executive has made no mention of Congress' statement in the Federal Aviation Act, 49 U.S.C. § 1513(b), generally permitting state taxes like Florida's, an omission that confirms the difficulties inherent in relying too strongly on informal pronouncements by the Executive.

In short, this case presents no unusual circumstances that would justify invalidation of a state tax because of the effect of that tax on foreign policy. Although appellant plainly would prefer to keep the tax monies rather than pay them over to the State of Florida, a refusal to accede to that preference does not seriously interfere with the power of the federal government to regulate foreign commerce.

## CONCLUSION

For the foregoing reasons, the judgment of the Florida Supreme Court should be affirmed.

Respectfully submitted,

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